

GILL, Richard PhD (03-02-07).txt

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1 IN THE UNITED STATES DISTRICT COURT  
2 FOR THE DISTRICT OF HAWAII  
3 THE ESTATE OF ERIC A. POWELL, )  
4 THROUGH PERSONAL REPRESENTATIVE ) CIVIL NO. CV04-00428  
5 MARK K. POWELL; THE ESTATE OF ) LEK  
6 JAMES D. LAUGHLIN, THROUGH )  
7 PERSONAL REPRESENTATIVE REGINAE C. )  
8 LAUGHLIN; MARY K. POWELL, )  
9 INDIVIDUALLY; RAGINAE C. LAUGHLIN, )  
10 INDIVIDUALLY; CHLOE LAUGHLIN, A )  
11 MINOR, THROUGH HER NEXT FRIEND, )  
12 REGINAE C. LAUGHLIN, )  
13 Plaintiffs, )  
14 vs. )  
15 CITY AND COUNTY OF HONOLULU, )  
16 Defendant, )  
17 and )  
18 CITY AND COUNTY OF HONOLULU, )  
19 Third-Party )  
20 Plaintiff, )  
21 vs. )  
22 UNIVERSITY OF HAWAII, a body )  
23 corporation; JOHN DOES 1-10; JANE )  
24 DOES 1-10; DOE CORPORATIONS and )  
25 DOE ENTITIES, )  
26 Third-Party )  
27 Defendants. )

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DEPOSITION OF RICHARD T. GILL, Ph.D.

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1 Taken on behalf of the Defendant City and County of  
2 Honolulu at the Law Offices of Lyons, Brandt, Cook &  
3 Hiramatsu, 1800 Davies Pacific Center, 841 Bishop Street,  
4 Honolulu, Hawaii, commencing at 9:10 a.m. on March 2,  
5 2007, pursuant to the Federal Rules of Civil Procedure.  
6  
7  
8  
9 BEFORE: SHEILA BRITT LIPTON, CSR NO. 257  
10 Notary Public, State of Hawaii  
11  
12 H O N O L U L U R E P O R T I N G S E R V I C E S  
13 1000 Bishop Street, Suite 401  
14 Honolulu, Hawaii 96813  
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16 (808) 524-6288  
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APPEARANCES:  
For the Plaintiffs: EMILY KAWASHIMA WATERS, ESQ.  
Law Offices of Ian L. Mattoch  
Suite 1835, Pacific Guardian Center  
737 Bishop Street  
Honolulu, Hawaii 96813  
  
For Defendant City and County of Honolulu: STEFAN M. REINKE, ESQ.  
Lyons, Brandt, Cook & Hiramatsu  
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841 Bishop Street  
Honolulu, Hawaii 96813  
  
and  
  
DEREK T. MAYESHIRO, ESQ.  
Deputy Corporation Counsel  
City and County of Honolulu  
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Honolulu, Hawaii 96813

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EXAMINATION BY:  
Mr. Reinke  
Ms. Waters

EXHIBITS MARKED FOR IDENTIFICATION:

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(whereupon the disclosure was presented to counsel.)

RICHARD T. GILL, Ph.D.,  
called as a witness by and on behalf of Defendant City and  
County of Honolulu, having been first duly sworn, was

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examined and testified as follows:

(Exhibits 1 - 3 were marked for identification.)

EXAMINATION

BY MR. REINKE:

Q. Your name and business address, please.

A. Richard Thomas Gill, G-i-l-l. 2104 West  
Riverside, Spokane, Washington. Rick would be fine.

Q. And with respect to your current resume, that was  
attached to your report; is that correct?

A. I believe it was, yes, sir.

Q. We've premarked as Exhibit 1 your report. Do you  
see that?

A. There are two reports.

Q. Your first report.

A. Yes. Yes, you did.

Q. We premarked Exhibit 2, your rebuttal report,  
correct?

A. Correct.

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Q. I did not attach your case list or your resume to  
this exhibit, but you are familiar with both those  
documents?

A. I am.

Q. Anything you'd like to update since those were  
done?

A. Nothing of any real substance. Obviously there's  
been some more grant or contract work. There's been some  
more depositions and trials. But the same general venue,  
human factors and safety.

Q. You've been retained as a witness since you  
prepared that report?

A. I have.

Q. And let me ask this, with respect to the  
retention since you prepared that report, any cases where  
the general subject matter is ocean safety?

A. Yes.

Q. What case is that?

A. One that comes to mind immediately is another  
drowning at Hanauma Bay.

Q. What's the name of that case?

A. I don't recall the case name.

Q. When did that drowning occur?

A. I have not received any file material in the case  
yet so I can't even tell you that. My understanding is

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it's relatively recent.

Q. What firm retained you in that case?

A. Shim & Chang.

Q. That case comes to mind, do you know what year  
that drowning occurred?

A. No, sir, I don't.

Q. Any other cases that come to mind?

A. I have looked at some other cases but then  
ultimately either declined to be involved or people had  
decided not to pursue the case because it didn't look like  
there was a basis for a case.

Q. Now, we're speaking with regard to cases since  
you prepared your report, correct?

A. Correct.

Q. Prior to preparing your report had you ever been  
asked to testify with regard to ocean safety cases?

A. In the broader sense of the term I would call it  
safety and risk management, human factors in terms of  
ocean safety, water safety. And I have been retained in a  
number of those. In fact, I've testified in trial in  
those.

Q. I'd like to have my focus be right now first on  
cases involving the ocean. And I want to be specific on

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24 cases that are dealing with the ocean. It can be the  
25 Pacific Ocean, the Atlantic ocean, any ocean that you

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1 want, the Indian ocean, any one. I'm not limiting you.

2 A. Well, I'll do the best I can. I don't sort cases  
3 out in my mind by ocean versus fresh water because the  
4 safety principles are one in the same.

5 Q. Actually if you can I want to focus first on  
6 oceans. Can you tell me the cases you've testified that  
7 have taken place involving the ocean or the beach leading  
8 up to the ocean or the ground leading up to the ocean?

9 A. By testifying are you talking about trials only  
10 or trials and depositions?

11 Q. Thank you. Because I actually asked a different  
12 question the first time. You focused me better. I want  
13 to know the cases you've been actually asked to look at by  
14 one side or the other, whether they retained you or not.  
15 Let's take it that way.

16 A. Oh, I don't even begin to remember all the ones  
17 I've looked at. I have a hard time remembering the ones  
18 I've testified in.

19 Q. Let's talk about then, if we can do it, how about  
20 the ones you've actually been retained in where you've  
21 actually been retained to give an opinion and you've been  
22 willing to give an opinion.

23 A. Ones that I can think of off the top of my head  
24 would be, I believe Lee was the plaintiff, Cronin, Fried  
25 was the firm. Had to do with a surf lesson incident,

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1 Kihei side, Maui. I believe I gave a deposition in that  
2 case. I'm certain I wrote a report in it. But it did not  
3 go to trial. That's one that I can think of off the top  
4 of my head.

5 Two that I know that did go to trial was Went and  
6 Wang versus the federal government that was over at Oheo  
7 Pools. And I believe that was Mike Livingston's group  
8 that had retained me on that.

9 Another one was the Mink Kahan case with Ian  
10 Mattoch's firm.

11 Q. Can you say the name again?

12 A. I believe it was Mink and Kahan. And that was  
13 against Volcano National Park.

14 Q. Any other cases you can think of right now?

15 A. There have been a number of them that I've been  
16 retained on pertaining to jet skis on the ocean, para-  
17 sailing on the ocean, shore breaks pertaining to the  
18 ocean. That's the only one I can think of right now. If  
19 others come to mind. These are ones that involved, I  
20 believe, reports and/or depositions. And, you know, then  
21 I've had sailing cases involving the ocean, scuba diving  
22 cases involving the ocean.

23 Q. So you've identified three specific cases and  
24 four or five classes of cases, jet skis, sailing, shore  
25 break, scuba cases; is that correct?

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1 A. Correct.

2 Q. Parasailing also?

3 A. Correct.

4 Q. With respect to the individual cases, the Lee  
5 case, the Wong case, and the Mink case, did any of those  
6 three cases involve lifeguarding, where you entered  
7 opinions with respect to lifeguarding services?

8 A. There was not lifeguarding literally per se.  
9 There was water rescue issues pertaining to the Went, Wang  
10 case.

11 Q. So with respect to Lee and with respect to the  
12 Mink case, those did not involve lifeguards or water  
13 safety officers; is that correct? When I say not  
14 involved, what I mean is your testimony did not involve  
15 giving opinions with respect to any services they might

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16 have provided?

17 A. That's correct.

18 Q. With respect to the went case, went, wong, did  
19 you give opinions with respect to any services that were  
20 provided for by either lifeguards or water safety  
21 officers?

22 A. Just so I can correct you, I think it's wang, not  
23 wong.

24 Q. Thank you very much. I appreciate the  
25 correction.

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1 A. No, there were no literal lifeguards associated  
2 with the attempted rescue. It was a ranger that didn't  
3 have adequate training. It was not a ranger that would  
4 have qualified as a lifeguard or a water safety officer.

5 Q. With regard to the five classes of cases we  
6 discussed earlier briefly, or identified earlier, the jet  
7 ski cases, did any of those cases that you can think of  
8 involve any opinion or testimony upon your part dealing  
9 with lifeguard services or water safety officer services?

10 A. Not that I recall.

11 Q. The same question for the parasailing cases,  
12 anything that involved lifeguarding services or water  
13 safety officer services?

14 A. I don't believe so.

15 Q. With respect to the scuba cases, did any of those  
16 cases involve lifeguards or water safety officers?

17 A. No. Not that I recall, no, sir.

18 Q. And finally with respect to sailing cases, I  
19 assume sailing means sailboats?

20 A. Correct.

21 Q. Did any of those cases have anything to do with  
22 the water safety officers or lifeguards where you gave  
23 opinions about their conduct?

24 A. I don't believe so, no, sir.

25 Q. The final was shore break on the ocean. You

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1 indicated you had shore break cases?

2 A. Correct.

3 Q. Did any of those cases involve situations where  
4 you rendered opinions with regard to the services provided  
5 by lifeguards or water safety officers?

6 A. I don't believe there were any on those beaches.

7 Q. Were any of those beaches in Hawaii?

8 A. Yes, they were.

9 Q. What beaches?

10 A. One that I can think of was Kaanapali Beach. And  
11 the other was down Wailea side. I think it was out in  
12 front of the Fairmont Orchid.

13 Q. Have you ever been asked to provide testimony in  
14 a case involving issues of lifeguard services or water  
15 safety officer services?

16 A. Yes, I have.

17 Q. How many times?

18 A. I couldn't give you a reasonable estimate. It's  
19 been a number. I would say probably a half dozen over the  
20 25 years would be my best estimate. That's a rough  
21 estimate.

22 Q. I understand that. Because I asked the big  
23 question being asked. That could include cases you've  
24 taken and cases you turned down, correct?

25 A. No. I'm just thinking of cases that I literally

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1 was involved in as opposed to looked at and said no, I  
2 can't help you, or I don't -- I prefer not to be involved.

3 Q. So you've looked at about a half dozen. How many  
4 here in Hawaii?

5 MS. WATERS: Objection. Misstates his testimony.

6 Half a dozen refers to cases he's been involved in. Isn't  
7 that right?

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THE WITNESS: Cases that I've been involved in with lifeguards, that would be my best estimate, yes.

BY MR. REINKE:

Q. How many of those occurred in the state of Hawaii?

A. Well, we're talking literal lifeguards?

Q. Explain yourself. You're not going to confuse me.

A. Well, you're drawing arbitrary distinctions like ocean water safety versus fresh water safety. And I want to be as accurate as I can for you in my answers.

Q. I'm still dealing with oceans right now. We're going to get to the fresh water in just a moment.

A. I understand. But now when you say lifeguarding do you literally formally mean a formalized lifeguard on a stand that is a trained formal lifeguard, or are we talking about like the Went, Wang case where it was a ranger that was attempting lifeguarding services?

Q. I'm talking about your first example, where we have trained lifeguards providing services to beach goers, those types of cases.

A. I misunderstood your question because I thought you moved away from beaches and you were only on lifeguards specific.

Q. I appreciate the clarification. I'm trying to be as clear as I can, and sometimes I get caught up. So with respect to the six cases you've identified, rough number that we identified earlier that involve lifeguards, not all of those involved in Hawaii, not all of those involve oceans?

A. No.

Q. How many of those involve oceans of that half dozen?

A. Again, since I'm estimating that number I can't tell you specific case, so it's hard for me to do that. Obviously there's this case and Roy Chang's case that involved lifeguards. And there's a couple of swimming pool cases back on the Mainland that involved lifeguarding. And the others I can't really tell you one way or the other. I know I've been involved in other lifeguarding type situations, but I can't at this point specifically go to the case in my mind.

Q. So you can think of about half a dozen cases

involving lifeguards, that's a rough number, it could be plus or minus two or three, right?

A. Correct. I'd be surprised if it was as high as a dozen. I'd be surprised if it was only the four I just mentioned.

Q. So we're in that range there. Of that range you've been able to clearly identify two that involve oceans, the case you're currently testifying about and the one that you have been retained in?

A. Right.

Q. Any others that you can think about that involve oceans and lifeguards?

A. Specifically lifeguards and oceans, right now those are the only ones I can think of.

Q. That's every place you testified in the country, I'm not just limiting it to Hawaii, correct?

A. That's my understanding.

Q. Have you rendered any opinions yet in the Chang matter?

A. No, I haven't. I haven't even been given any case material on it.

Q. So you actually aren't even sure you're going to give testimony in that case; is that correct?

A. I've been retained to provide testimony as far as analyze things and write a report, and if asked, give a

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1 deposition.

2 Q. what do you know about that case?

3 A. The general gist that I recall from the  
4 discussions that I've had was that it was a female, I  
5 believe she was mid-thirties, dry snorkel, was on the  
6 inner reef, apparently ingested water, panicked. And I  
7 believe one or the other park visitors saw her struggling  
8 and came to her aid and was trying to hold her out of the  
9 water. In the process he stood up on the reef and was  
10 waving to try to get the lifeguard's attention. Failed to  
11 do so. Another visitor that was in the area swimming and  
12 snorkeling saw him, came to assist him in trying to assist  
13 the person. And the two of them were waving and yelling  
14 for assistance. And one of their companions that was with  
15 him, wife or a friend or whatever, noticed them out on the  
16 reef waving, trying to get the lifeguard's attention, and  
17 went to the lifeguard stand and alerted the lifeguard that  
18 it looked like somebody needed help. And then the  
19 lifeguard was dispatched.

20 Q. Do you know what part of Hanauma Bay it occurred  
21 in?

22 A. My understanding it was the inner reef. That's  
23 all I can tell you.

24 Q. You don't know if it was directly in front of the  
25 stand, at the edge, no information?

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1 A. Not at this point.

2 Q. I know that you look at a lot of cases and  
3 sometimes you take them, sometimes you don't. Why did you  
4 decide to take this case since you haven't seen any of the  
5 materials yet?

6 A. This case?

7 Q. No. The Roy Chang case.

8 A. I've worked with Roy Chang over the years. I  
9 have a lot of respect for him. I know that he would never  
10 ask me to do anything other than give an open and honest  
11 opinion. If I get into the material and I say Roy, I  
12 don't see anything here, he would accept that. I would  
13 honor that. I would still be paid for my services.

14 Q. So you have not formed an opinion in that case as  
15 to the responsibility of any of the parties; is that  
16 correct?

17 A. No. All I have is a verbal description. So it  
18 would be premature to form an opinion.

19 Q. You said something about a dry snorkel. I don't  
20 know what that is.

21 A. The traditional snorkel is one that is just an  
22 open tube on top so when you go under the water it fills  
23 with water and you have to blow the water back out. The  
24 dry snorkel is one at the top, through some mechanical  
25 device, and there's a number of different ones, closes off

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1 to prohibit water from getting into the snorkel so you can  
2 go under, a wave can wash over you. In theory you don't  
3 get water into the snorkel tube.

4 Q. Have you been asked to render opinions with  
5 regard to the duty and responsibility of the manufacturer  
6 of that snorkel in that case?

7 A. That's something that I will be looking at, yes,  
8 sir.

9 Q. Do you know if in that case that snorkel was  
10 owned by the victim or whether it was rented from a  
11 concessionaire?

12 A. Again, it's early in the case. My understanding  
13 from the discussions is it appears that it was rented  
14 there at Hanauma Bay. But again I have no documentation  
15 yet. Just verbal discussions.

16 Q. We've been talking for a little bit, and  
17 sometimes your memory gets refreshed. Any other ocean

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18 cases you can think of?

19 A. I appreciate you coming back to it. If I think  
20 of things I'll do my best to interject things as we go  
21 along. Nothing has come to mind.

22 Q. Let's move to fresh water incidents. You're from  
23 Idaho, correct?

24 A. Well, Washington. But close.

25 Q. You spent most your time on land, correct?

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1 A. Correct.

2 Q. You don't live on a beach front on the Mainland,  
3 correct?

4 A. No, sir, I don't.

5 Q. There are lakes though up in that area, aren't  
6 there?

7 A. There are.

8 Q. So you're familiar with lakes and people using  
9 lakes for recreational purposes, correct?

10 A. Very much so.

11 Q. Have you rendered opinions with respect to  
12 lifeguarding services on lakes?

13 A. I don't believe so.

14 Q. Have you ever been asked to or have you ever  
15 rendered an opinion with respect to the need for a  
16 facility to provide lifeguarding services?

17 A. Other than obviously in this matter.

18 Q. I'm sorry. Let me make sure my question is  
19 absolutely clear with respect to lakes.

20 Have you ever been asked to provide any opinion  
21 with respect to the need for a facility to provide  
22 lifeguarding services?

23 A. I don't believe so.

24 Q. Other than this case that we're in presently, the  
25 one involving Mr. Powell and Mr. Laughlin, have you ever

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1 been asked to provide an opinion with respect to the need  
2 for a facility to provide lifeguarding services?

3 A. I don't know that was necessarily part of my  
4 opinion. I think it was a given that there was a need for  
5 them to provide lifeguarding services because lifeguards  
6 were provided.

7 Q. In this case?

8 A. In other cases that I've been involved in.

9 Q. That's that roughly half dozen cases, correct?

10 A. Correct.

11 Q. You identified earlier pool cases?

12 A. Correct.

13 Q. Approximately how many pool cases can you recall  
14 where you were asked to give opinions with respect to  
15 lifeguarding services?

16 A. Like I said, there's two in general that I can  
17 think of on the Mainland.

18 Q. What states?

19 A. Washington and I believe -- That's one I'm  
20 certain of. I believe the other one was in Washington as  
21 well, but it may have been Idaho.

22 Q. The Washington case first as opposed to the  
23 Washington, Idaho case. In the Washington case was your  
24 retention with respect to the providing of lifeguarding  
25 services or the need to provide lifeguarding services?

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1 A. Neither. My retention was the same as it was in  
2 this matter. It was to evaluate the safety and risk  
3 management principles, the human factors principles  
4 associated with the incident.

5 Q. Were lifeguards in the Washington case?

6 A. Yes, there was. At least one. I think there  
7 were two, but I'm not certain. But I know there was at  
8 least one.

9 Q. With respect to the Washington, Idaho, the



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10 second, was that a case where there were actually  
11 lifeguards provided?

12 A. Yes, there was.

13 Q. How many lifeguards were there in that case?

14 A. Since that case is vaguer, I can't remember. But  
15 I know again there was at least one that was provided and  
16 there may have been multiple.

17 Q. We covered fresh water, pools, and oceans. Any  
18 other kinds of body of water that you can think of that  
19 you've provided testimony on with respect to lifeguarding  
20 services?

21 A. If you narrow it to lifeguarding services, not  
22 that I can think of, no. Again, that's not the focus of  
23 what my testimony typically is in, nor is it in this case.

24 Q. Have you ever rendered an opinion in any case  
25 involving any type of body of water that a facility had an  
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1 obligation to provide lifeguarding services in a facility  
2 that did not have lifeguards present normally?

3 A. Not that I can recall.

4 Q. Have you ever been, in any type of body of water,  
5 asked to give an opinion that with regard to the number of  
6 lifeguards that were present in providing services at a  
7 facility, whether that number was adequate or inadequate?

8 A. In any body of water?

9 Q. Any body of water.

10 A. So swimming pools and the like?

11 Q. Swimming pools to ocean to fresh water. I guess  
12 the great Salt Lake, which would be another body of water.

13 A. Well, I think I understand your question. But  
14 that's not typically the way my retention works where  
15 somebody says I want you to provide an opinion about A.  
16 It's the other way around.

17 What I'm retained to do is apply my training and  
18 experience and expertise in human factors and risk  
19 management to the facts of the case. And that may  
20 ultimately lead to that type of issue. But I don't get  
21 retained specific to the question that you're asking. If  
22 someone attempted to retain me specific to such a narrow  
23 issue, whether it's lifeguarding or the lug nuts proper  
24 for a wheel, I'm not sure I'd be willing to be involved in  
25 the case because then that's not allowing me to apply my  
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1 expertise to the facts of the case. I feel like I'm being  
2 told what I have to say, and I don't care to work in those  
3 conditions.

4 Q. Have you ever in the course of your career as a  
5 witness in providing expert witness services, have you  
6 ever rendered an opinion that there were inadequate number  
7 of lifeguards at a facility regardless of the type of body  
8 of water?

9 A. Other than this case?

10 Q. Other than this case.

11 A. I don't recall specifically having done so. I  
12 think the other cases that I was involved in, the general  
13 ratio of lifeguards to swimmers, the general physical  
14 space that they were required to monitor was such that I  
15 think it was adequate.

16 Q. Have you ever testified under oath that the ocean  
17 is inherently dangerous?

18 A. I can't tell you if I have or have not.

19 Q. Do you have an opinion as to whether the ocean is  
20 inherently dangerous?

21 A. You'd have to be more specific. That's such a  
22 broad question.

23 Q. Too broad to state?

24 A. Just literally that question in and of itself,  
25 yes, sir.

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1 Q. Do you believe that there are inherent dangers in

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2 the ocean?

3 MS. WATERS: Objection. Lacks foundation.

4 THE WITNESS: Again, you're awful broad.

5 Certainly if you are scuba diving at 200 feet or if you're  
6 out surfing on 50-foot waves, certainly there are inherent  
7 dangers or risks associated with that.

8 BY MR. REINKE:

9 Q. Have you ever testified under oath that people  
10 entering the ocean assume the risk of inherent dangers?

11 A. Again, that's so broad I couldn't begin to answer  
12 that.

13 Q. In those cases where you've determined that there  
14 was an adequate number of lifeguards, how did you go about  
15 making that determination?

16 A. As best as I recall it was working with the water  
17 safety officer type person by reviewing with them general  
18 lifeguarding principles, ratios of people to lifeguards,  
19 observing physical dimensions, observing the view space  
20 that the lifeguards had. Using basic human factors  
21 principles to compute scan times. And then from that  
22 feeling comfortable that yes, from a human factors side of  
23 things, not from a water safety officer side of things,  
24 the tasks that the people were being asked to do was  
25 reasonable and could be performed.

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1 Q. You say you worked with water safety officer  
2 types; is that correct?

3 A. Correct.

4 Q. What type of information did you get from them?

5 A. Well, it would be things like basic, what I call,  
6 I think I refer to it in my report as the 10 second, 30  
7 second rule is one of the basic principles that I've heard  
8 from a number of people in lifeguarding. You should scan  
9 the area that you are responsible for in its entirety  
10 within a ten second interval. You should be able to  
11 respond to someone in a distress situation within 30  
12 seconds. Those are things that have been discussed with  
13 me or I've reviewed in things that I've read over the  
14 years.

15 Q. Have you ever had any special training with  
16 respect to water safety?

17 A. Not any formalized courses. Again, what happens  
18 is my area is risk management. I work with domain  
19 specific people. In cases like this it would be a water  
20 safety person. Consequently, there is an overlap in terms  
21 of you always gain new information from these domain  
22 specific people. That would be the training that I've  
23 had. But it's not like I've been formally trained in  
24 water safety or lifeguarding.

25 Q. When we talk about water safety training, I'm

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1 intending to include lifeguarding within that. Are you?

2 A. I am.

3 Q. So we're on the same wavelength. When we have  
4 water safety officers and they're trained how to be  
5 lifeguards. Are we on the same wavelength in that regard?

6 A. I haven't seen anything that would lead me to  
7 believe otherwise.

8 Q. I want to make sure. You know the deposition  
9 process. If you don't understand, you ask me to clear it  
10 up. Correct?

11 A. If I'm aware of the fact that I have a  
12 misunderstanding or potential misunderstanding, I'll  
13 always ask.

14 Q. Or if I have a misunderstanding, you'll clear it  
15 up for me, right?

16 A. I'll do my best.

17 Q. You have no formal education with respect to  
18 water safety issues; is that correct?

19 A. Right. There's no formalized training. I

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20 haven't gone and taken courses in it. I've acquired some  
21 of that basic knowledge over the years. But again that's  
22 not my area of focus of area of expertise. It's in risk  
23 management.

24 Q. And have you ever attended any seminars with  
25 respect to water safety?

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1 A. Not where that was the title of the seminar.  
2 Again, what would happen is there would be presentations  
3 of people that would be giving presentations, somebody  
4 such as Mr. Ebro, for example, where that may be the focus  
5 of their expertise, but not an entire seminar dedicated to  
6 that.

7 Q. So, for example, at a human factors symposium  
8 there may be someone speaking, correct?

9 A. Correct.

10 Q. You attend those, correct?

11 A. I do.

12 Q. Do you present at those?

13 A. I do.

14 Q. Have you ever presented on an issue dealing with  
15 water safety?

16 A. Not specific to that. I may have called up  
17 examples from that in part of my presentation, such as  
18 warning signs that are posted at swimming pools, as an  
19 example. And talking about the adequacy or inadequacy of  
20 those signs.

21 Q. How about with respect to issues involving  
22 lifeguarding services, have you ever presented in any  
23 seminar with respect to lifeguarding services?

24 A. Not where that was the focus of the seminar, no.

25 Q. Have you ever attended a seminar where that was

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1 the focus of the seminar, lifeguarding services?

2 A. No, sir.

3 Q. Do you have any special training in identifying  
4 ocean conditions?

5 A. What do you mean by conditions?

6 Q. Waves, current, undertow, things along those  
7 lines.

8 A. I don't have any formalized training. I have a  
9 lot of experience in that from 20 years of being around  
10 the ocean and being involved in ocean type cases and in  
11 safety. But no formalized training.

12 Q. Do you know how you estimate wave heights in the  
13 state of Hawaii?

14 A. Well, I know that up until a few years ago the  
15 state of Hawaii was unique in that it estimates or reports  
16 wave heights from the rear, if you will. Whereas, most of  
17 the rest of the world is peak to trough.

18 Q. Do you know how it's reported today?

19 A. I think it depends on the source where you get  
20 your information. My understanding is there's been a  
21 movement afoot to try to bring Hawaii into the same  
22 measurement scheme as the rest of the world, if you will.

23 Q. Are you scuba certified?

24 A. I am.

25 Q. Are you snorkeling certified?

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1 A. I didn't know there was such a thing.

2 Q. I wasn't sure if there was either. I was just  
3 checking. So you're not?

4 A. No, I am not.

5 Q. Have you ever snorkeled?

6 A. Many, many times.

7 Q. Snorkeled at Hanauma Bay?

8 A. I have.

9 Q. About how many times?

10 A. Half a dozen would be my best estimate.

11 Q. Over what period of time, if you can tell me?

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12 A. Oh, in the last 15 plus years.  
 13 Q. Have you ever taught scuba courses?  
 14 A. No, not to get someone licensed. I've assisted  
 15 people in learning to scuba, but again not a formalized  
 16 teacher.  
 17 Q. Have you ever taught any courses with respect to  
 18 lifeguarding services?  
 19 A. No, sir.  
 20 Q. How about with respect to water safety?  
 21 A. Just to my kids and their friends.  
 22 Q. You've never as part of an academic program  
 23 taught anything about water safety?  
 24 A. No, sir, I have not.  
 25 Q. Have you ever published any articles with respect

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1 to lifeguarding, snorkeling, scuba diving, ocean  
 2 conditions?  
 3 A. I don't believe so, no, sir.  
 4 Q. And with respect to your retention on these water  
 5 cases, water and lifeguarding cases, any kind of water,  
 6 lifeguarding, were you retained by the plaintiffs in those  
 7 cases or the defendants in those cases?  
 8 A. Both.  
 9 Q. Which cases were you retained by the defendants?  
 10 A. One that I can think of in particular was the  
 11 shore break case at the Fairmont in Wailea.  
 12 Q. And who retained you?  
 13 A. Steve Dwyer. I'm sorry. His name was right on  
 14 the top of my tongue.  
 15 Q. Do you recall what year that was?  
 16 A. If I had to estimate I would say within the last  
 17 three years. Two years back. Maybe three years back.  
 18 Q. Did that case go to trial?  
 19 A. I don't think it did. I think it settled short  
 20 of trial.  
 21 Q. Did you give a deposition in that case?  
 22 A. I believe I did.  
 23 Q. And what opinions were you asked to provide in  
 24 that case?  
 25 A. The same as this case. To apply my training and

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1 experience and expertise in human factors, and more  
 2 particular risk management.  
 3 Q. Do you recall any of the specific opinions you  
 4 gave in that case?  
 5 A. No, I don't. I know it was related to user  
 6 knowledge and experience and adequacy or inadequacy of  
 7 warnings.  
 8 Q. And who were the defendants in that case, do you  
 9 recall?  
 10 A. Well, obviously the Fairmont was. I don't recall  
 11 if the city, county, state, if there was a governmental  
 12 agency involved or not. I honestly don't remember. I  
 13 don't believe there was. At least not at the time of my  
 14 involvement.  
 15 Another case involving the defendant would have  
 16 been the swimming pool case in Washington, as we labeled  
 17 it.  
 18 Q. The first one. Was it a municipality?  
 19 A. I believe it was.  
 20 Q. Do you recall which municipality, state of  
 21 Washington?  
 22 A. No. I think it was city. It would have either  
 23 been Spokane or Spokane Valley, as I recall.  
 24 Q. How long ago did that case take place?  
 25 A. My best estimate would be five or six years ago.

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1 Q. Do you recall the name of the law firm, the  
 2 attorney that retained you?  
 3 A. Paul Kirkpatrick was the attorney. And the firm

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4 currently is Kirkpatrick & Startzel.  
5 Q. And did that case go to trial?  
6 A. I don't believe so.  
7 Q. Did you give a deposition?  
8 A. I'm not certain one way or another. I don't  
9 recall having given one, but I can't tell you with  
10 confidence that I did not.  
11 Q. So you've identified those two defendants in  
12 cases involving lifeguarding services?  
13 A. Correct. If you limit it to lifeguarding  
14 services, those are the only two that I can think of out  
15 of the four that I could think of involving lifeguarding  
16 type things.  
17 Q. The other two would be the Mattoch firm and the  
18 Chang firm, correct?  
19 A. Correct.  
20 Q. Those are plaintiff's firms, right?  
21 A. That's correct. I wouldn't call them plaintiff's  
22 firms. I would say that's what they specialize in. I've  
23 done defense work, for example, with Roy Chang.  
24 Q. Never involving pools or water safety, correct?  
25 A. I don't think any of the water cases I've had

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1 with Mr. Chang's office have been defense related, no.  
2 Q. How many drowning cases have you been involved in  
3 inclusive of this one?  
4 A. If you bear with me, if I think of them out loud  
5 in terms of the cases it would help me.  
6 Q. I will bear with you in that regard.  
7 A. Certainly there was one on Guam that was  
8 literally a drowning case. There was one in Oklahoma.  
9 Other than the cases we've mentioned so far, I know there  
10 was at least one other swimming pool drowning case here in  
11 Hawaii. There was the drowning case in the Washington  
12 pool that we talked about. And, I believe, the other  
13 Washington, Idaho pool case was a drowning. There was one  
14 in Oregon, Washington or Oregon, it was right on the  
15 border, on the ocean. And it was disputed whether it was  
16 suffocation from a bench collapse of sand or drowning from  
17 the water that was what the ultimate cause of death was.  
18 But I believe it was drowning. Those are the ones that I  
19 can think of off the top of my head right now.  
20 Q. Would it be fair to say then that there could be  
21 circumstances where there was lifeguards present and  
22 drowning occurs and there's no fault of the municipality  
23 or the person providing lifeguarding services for that  
24 drowning?  
25 A. Again, it's a big broad statement. But in

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1 general I can conceive of that situation, yes.  
2 Q. You've testified for defendants who were  
3 providing lifeguarding services, and I'm presuming you  
4 didn't testify that they did anything wrong in those  
5 cases?  
6 A. I wouldn't draw that conclusion, no, sir.  
7 Q. Well, let's go back and spend some time with that  
8 because I'd like to understand your testimony that you  
9 provided on behalf of defendants. You indicated they did  
10 something wrong in one of those cases?  
11 A. I wouldn't draw that conclusion either. All I'm  
12 saying is you've said since I was retained by the  
13 defendant, therefore, I concluded they did nothing wrong.  
14 I wouldn't draw that conclusion.  
15 Q. You actually went to court and provided  
16 testimony. In any of those cases did you conclude they  
17 did anything wrong?  
18 A. Again, it's been so long I can't tell you whether  
19 I did or I didn't. All I can tell you is I don't agree  
20 with the premises of the general questions that you posed,  
21 since I had testified for a defendant, therefore, I

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22 testified they did nothing wrong. That doesn't follow in  
23 my book.

24 Q. In regards to the Fairmont case, that specific  
25 case, did you find any fault with the defendant's conduct  
00035

1 in that case?

2 A. I believe I did in the sense of the issues  
3 pertaining to the warnings and the adequacy.

4 Q. There were no lifeguards provided in that case,  
5 correct?

6 A. I don't believe there were, but I can't say with  
7 certainty. But I don't believe that's a lifeguarded  
8 beach.

9 Q. With respect to the Washington pool case, there  
10 was a lifeguard present and there was a drowning, correct?

11 A. Correct.

12 Q. Did you find any fault with the lifeguarding  
13 services provided by the municipality in connection with  
14 that case?

15 A. Again, it's been so long I can't tell you if I  
16 did or did not.

17 Q. So if you saw your opinion in that case that  
18 would refresh your recollection?

19 A. Yes. Again, I don't know if I testified in a  
20 deposition in that case or not.

21 Q. Or if you saw your report in that case?

22 A. That's correct.

23 Q. You did prepare a report in that case?

24 A. I can't tell you I did or did not.

25 Q. Would you agree with me that having lifeguards  
00036

1 present does not ensure that a drowning won't occur?

2 A. In general I would agree with that.

3 Q. Would you agree with the principle that the fact  
4 that a drowning occurs does not necessarily mean that any  
5 party was negligent?

6 A. In a broad sense of the term, yes.

7 Q. That's consistent with Hawaii law, isn't it?

8 A. I have no idea. I'm not here to offer legal  
9 opinions.

10 Q. In fact, you are not an expert in legal issues;  
11 is that correct?

12 A. That's correct.

13 Q. You defer to the lawyers for that?

14 A. And the judge.

15 Q. Have you ever been retained by any entity,  
16 whether it's a municipality or a private landowner, to  
17 design a water safety program for their facility, any type  
18 of water facility?

19 A. No, sir.

20 Q. Have you ever provided testimony on any type of  
21 case against the City and County of Honolulu?

22 A. Yes, I have.

23 Q. About how many occasions?

24 A. Boy, over the last 20 years, I would say in  
25 deposition or court testimony there's probably been 20 or  
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1 more at least. Part of my problem is it's not always  
2 clear in my memory whether it's city, county or state.  
3 Because it's not relevant to my analysis. But I know it's  
4 a governmental entity that is the defendant.

5 Q. Have you ever given an opinion or testimony that  
6 blamed the plaintiff for failure to exercise commonsense  
7 for assuming a risk or failing to exercise due care?

8 MS. WATERS: Objection. Compound. Vague and  
9 ambiguous.

10 THE WITNESS: It's a pretty broad and sweeping  
11 question. But in general yes, I think I have.

12 BY MR. REINKE:

13 Q. Let me break it down because I want to make sure

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14 I get this one into evidence. And that objection was  
15 probably pretty good.

16 Have you ever blamed a plaintiff for failing to  
17 exercise commonsense?

18 A. I don't know that's literally the words that I  
19 would have used. But I would say I have found fault in  
20 plaintiff's behavior for the actions in which they were  
21 engaged.

22 Q. Have you ever rendered an opinion that a  
23 plaintiff was negligent for failing to exercise due care?

24 A. I don't see a difference in my mind's eye between  
25 those two questions. There may be legal terminology that

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1 distinguishes those two. But in my mind the questions  
2 you're asking me, have I found fault with the behavior of  
3 a plaintiff in the past, and the answer is yes, I have.

4 Q. There is a reason I asked the question I asked.  
5 I'm going to try it again and see whether you appreciate  
6 the distinction or not in the circumstances. I appreciate  
7 you don't or may not. But let me ask the question.  
8 Have you ever rendered an opinion that a plaintiff  
9 was negligent for failing to exercise due care?

10 A. I can't give you any different answer than I did  
11 before. The best example I can give you is you as an  
12 attorney, and I don't mean to take issue with it, have  
13 specific definitions with terms. And you operationally  
14 define the word entirely different than the rest of the  
15 planet. So I know that words like negligent and due care  
16 are terms of art used in the legal profession. And I'm  
17 not here to offer legal testimony. So your two questions  
18 to me as an expert in safety are indistinguishable.  
19 They're the same question.

20 Q. You use the word negligent in your reports?

21 A. I may use them, but I would use them the way a  
22 layperson would use them. Not in the way an attorney or  
23 judge would use them. And that's why I'm saying in my  
24 mind those two questions that you just read me are one in  
25 the same.

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1 I can appreciate in the legal profession that you  
2 operationally define certain words to mean certain things.  
3 I don't want to get caught up in a game of semantics where  
4 you're using the term in the legal sense, yet my answer in  
5 the question is in the common layperson's everyday use of  
6 the term. That's why I'm saying to me those two questions  
7 are the same.

8 Q. So what is your answer to the question?

9 A. The same as I gave you to the previous question.  
10 That is, I have found in the past that the behavior of a  
11 plaintiff was such that it was a contributing factor in  
12 the accident.

13 Q. Have you ever given an opinion that a plaintiff  
14 failed to exercise due care?

15 A. Same answer as the first question.

16 Q. Have you ever opined in a case where you have  
17 been retained by the plaintiff that the plaintiff did, in  
18 fact, contribute to their own injuries?

19 A. Many times, yes, sir.

20 Q. In a generic sense when you have done that what  
21 factors did you take into account in determining that the  
22 plaintiff had, in fact, contributed to their own injuries?

23 A. The same that I do in any analysis whether I do  
24 or don't come to that conclusion and whether I'm retained  
25 by the plaintiff or the defense. And that is a standard

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1 human factors safety analysis.

2 Q. Let's focus on the conduct of plaintiff in a  
3 case. What type of factors are those standard human  
4 factors?

5 A. Well, the things that you look at are you look



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6 for two broad categories, errors of omission and errors of  
7 comission. You look for things about their knowledge of  
8 the task that they were performing. Their skill level  
9 with the task that they were performing. Their knowledge  
10 and/or awareness of the potential hazards that were  
11 observed with what they were performing. Whether or not  
12 they had the skills, expertise, and physical ability to  
13 engage in the tasks that they were performing. Whether or  
14 not they knowingly chose to assume a certain risk. In  
15 other words, somebody says boy, the ice is really thin,  
16 and this area is closed, you should walk around it, and  
17 they say no, I want to go across. Then that is a  
18 situation that you would obviously bring to bear.  
19 So those are the kinds of things that you look  
20 for, the physical ability to perceive the issues that are  
21 relevant to the tasks that they were performing.

22 Q. Anything else?

23 A. I'm sure there's other things depending on case  
24 specific, but in broad categories those are the things  
25 that I can think of.

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1 Q. You've been retained and being paid to provide  
2 services in this case, correct?

3 A. Correct.

4 Q. To date up through this morning do you know how  
5 much you have charged for your services in this case?

6 A. I don't have any idea.

7 Q. Do you have your bills with you?

8 A. No, sir, I don't.

9 Q. So you can't even give me that estimate?

10 A. It would be a pretty crude estimate. I mean, I  
11 can give you an estimate if you'd like one. You got to  
12 understand I've been involved in this case for several  
13 years and I don't have any idea what it is. I can only  
14 look at the file and try to provide an estimate.

15 Q. Your office could probably provide you an  
16 estimate pretty easily?

17 A. My billing manager could tell you precisely, yes.

18 Q. Is your billing manager working today?

19 A. I have no idea.

20 Q. Have you talked to her?

21 A. No. I hardly ever talk to her.

22 Q. Would it be possible on a break to try to contact  
23 her so I can get an answer to that question where you are  
24 to date in terms of your billing?

25 A. I'd be happy to.

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1 Q. We know what your hourly fee is. That hasn't  
2 changed since you started this case, has it?

3 A. It has. But when I'm retained on a case I keep  
4 my fees fixed through the life of the case.

5 Q. She would be able to tell us what your costs are  
6 for your time and what your out-of-pocket expenses were?

7 A. She would have to go through each of the billings  
8 and segregate it out. We just send the bill for the total  
9 amount.

10 Q. How often do you bill?

11 A. I think she bills every other month.

12 Q. So she could provide us that information if she's  
13 available today?

14 A. Of course.

15 Q. I'm going to ask you, if you wouldn't mind,  
16 giving her a call and she can e-mail me the information.

17 A. You just want it today and today only? If she's  
18 not available today or doesn't respond --

19 Q. I'll take it later too.

20 A. That's what I'm trying to find out. I need to  
21 know what my task is. I'm happy to call her and have her  
22 send things today. But if she doesn't, do you want me to  
23 get a copy of all the billings and send to the court



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24 reporter or send to Emily and she can send on to you?

25 Q. Yes.

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1 A. Can you make a decision here?

2 Q. You can send them to Emily and Emily can send  
3 them to me if you can't get the information today. That  
4 would be great.

5 Let me ask this question. Excluding today, do  
6 you anticipate incurring any additional fees and costs in  
7 connection with this case?

8 A. The only thing I would envision doing would be  
9 reviewing any additional discovery material that's  
10 relevant to my area of expertise. In particular, should  
11 the defendant decide to retain a safety risk management,  
12 human factors type person, any additional work that might  
13 be done by Major -- I can't think of his last name now.

14 MS. WATERS: Maceo.

15 THE WITNESS: Major Maceo. And getting ready for  
16 trial.

17 BY MR. REINKE:

18 Q. Obviously you can't give me an estimate about  
19 unknown discovery materials. But how about trial prep,  
20 can you give me an estimate of how long you think you'll  
21 spend on trial prep?

22 A. No. Again, that varies widely depending on  
23 whether Ms. Waters or the Ian Mattoch firm does most of  
24 the legwork to outline what they anticipate the direct  
25 testimony being, or whether they ask me to do that.

00044

1 Q. If they ask you to do it, you're talking about an  
2 hour, hour and a half?

3 A. No. I think it would take more than that to go  
4 through a file of this magnitude and outline the  
5 testimony.

6 Q. Less than 30 hours?

7 A. Oh, yes. Way less than that.

8 Q. Somewhere between an hour and a half and 30?

9 A. I think that's a good spread.

10 Q. Can you get it closer?

11 A. I think it would be half a day, certainly under a  
12 day.

13 Q. Less than eight hours?

14 A. Yes.

15 MR. REINKE: Why don't we take a short break.  
16 Off the record.

17 (Recess taken.)

18 MR. REINKE: Back on the record.

19 Q. Have you ever written a manual, guideline, or  
20 specification for the training of lifeguards?

21 A. No.

22 Q. In connection with this case did you review any  
23 manuals or guidelines with respect to the training of  
24 lifeguards?

25 A. I think there were some basic issues like that

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1 that was provided. But it's all in my file right here.

2 Q. At the lunch hour I'm going to go through your  
3 file, if you don't mind.

4 A. Not at all.

5 Q. Have you ever tried to calculate your percentage  
6 of plaintiff versus defense cases?

7 A. I've not tried to calculate it. I've been asked  
8 that question many times. And in the last five years,  
9 primarily because of my work in Hawaii, the overall total  
10 is skewed a little bit towards the plaintiff's case more  
11 than it was. I would say 70, sometimes as high as  
12 80 percent plaintiff.

13 Q. Of your work now how much of it takes place in  
14 Hawaii?

15 A. Certainly a higher percent of the sworn testimony

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16 takes place over here for some reason. I think a lot of  
17 that is just the CAP arb program.

18 Q. Have you ever been disqualified by a court with  
19 respect to the areas that you've claimed to be an expert?

20 A. No, I have not. There's been one time where I  
21 was not permitted to testify, so to speak. But that was  
22 based on two separate issues. And the judge's ruling, I  
23 think, was right on on both of them.

24 Q. When did that occur?

25 A. Oh, I think it's been ten years or more now.

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1 Q. And I seem to recall reading something about two  
2 years ago where you weren't allowed to testify in a case  
3 involving the city and county. Do you recall that?

4 A. I think it was a preservation deposition that was  
5 given. And I think there was an issue about the  
6 preservation depo not being shown to the jury.

7 Q. Have you ever participated in what they call a  
8 Dalbert hearing?

9 A. Many times.

10 Q. When was the last time?

11 A. I don't recall.

12 Q. Have you ever had to do that in Hawaii?

13 A. I believe I did a number of times, particularly  
14 on ones pertaining to what I would call risk management  
15 issues pertaining to parks and recreation. In other  
16 words, the area of expertise that I'm offering in this  
17 case.

18 So it would be like the Motu case would have been  
19 one. I don't know if there was or not. For another one  
20 that went to trial was either Howard or Louis, which was  
21 another. I don't think it was a drowning. It was a  
22 quadriplegic water accident case. My testimony in safety  
23 and risk management for parks and recreational areas was  
24 the area of expertise. I think there may have been one on  
25 that. I don't recall there being one in the federal case,

00047

1 the went, wang case. There may have been a motion that  
2 was filed and resolved itself without me even knowing  
3 about it.

4 Q. The Howard Louis case, what was that case about?

5 A. It's either Howard or Louis. I don't recall  
6 which of the two it was. It was an accident over on  
7 Kauai. It was somebody that was, I believe, paralyzed or  
8 quadriplegic. I think they were just paralyzed from a  
9 diving accident.

10 Q. In fresh water?

11 A. Fresh water.

12 Q. The pools?

13 A. No. This was Kauai side. It was a stream, river  
14 bed where people had routinely damned up an area with  
15 rocks to make it for a swimming pool.

16 Q. Was that a warnings case?

17 A. Warnings was part of the case. The bigger issue  
18 was the same as the facts in this case, safety and risk  
19 management.

20 Q. And you were representing the plaintiff or the  
21 defendant in that case?

22 A. Plaintiff.

23 Q. Who was the retaining attorney?

24 A. I'm not sure if it was John Rapp or if it was  
25 somebody in Mike Green's office. But it was Mike Green's

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1 office that did the actual trying of the case. I can't  
2 remember his name right now. But it wasn't Mike Green.  
3 But it was one of his senior associates. I would  
4 recognize the name, but I can't think of it off the top of  
5 my head.

6 Q. That case didn't involve lifeguarding services,  
7 did it?

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8 A. No. It was just -- It involved the same issues  
 9 as this case involved, risk management and park and  
 10 recreation area.

11 Q. Do you know how many beaches there are in the  
 12 state of Hawaii?

13 A. No, sir, I don't.

14 Q. Do you know how many guarded beaches there are in  
 15 the state of Hawaii?

16 A. Based on what I read in the discovery material,  
 17 there's 18 on Oahu is what I recall. But I don't know  
 18 what it would be for the other islands.

19 Q. Do you know who is responsible for providing  
 20 lifeguarding services on the island of Oahu?

21 A. I don't know the official organization, no, sir.

22 Q. Do you know who is responsible for providing  
 23 lifeguard services on the island of Hawaii?

24 A. No, sir, I don't.

25 Q. How about in the county of Maui?

00049

1 A. I don't.

2 Q. How about the county of Kauai?

3 A. I don't.

4 Q. Are you a member of any water safety  
 5 associations?

6 A. No, sir.

7 Q. How about lifeguarding associations?

8 A. No, sir.

9 Q. Pool safety?

10 A. Not specific to that, no, sir.

11 Q. You are a member of some human factors societies,  
 12 correct?

13 A. I am.

14 Q. Do you serve on any committees for any of those  
 15 human factors organizations or associations that deal with  
 16 water safety?

17 A. Not specific to that, no, sir.

18 Q. Do you know if any of those organizations have  
 19 committees or working groups that deal with water safety  
 20 issues?

21 A. That deal with, yes. That that is the specific  
 22 title to which they focus their attention, no, there are  
 23 not to my knowledge.

24 Q. Which groups deal with water safety issues as  
 25 subcommittees or working groups? I don't want to get

00050

1 caught up in too much nomenclature because some  
 2 associations will call it committee or working group or a  
 3 task force. We understand what we're talking about,  
 4 correct?

5 A. We do. At least I think I have a pretty good  
 6 feel for what you are talking about. I would say it would  
 7 be the safety group and the forensic group would be the  
 8 two most likely.

9 Q. But nobody that specifically breaks down and says  
 10 water safety, this is our focus?

11 A. No.

12 Q. Are you aware of any journals dealing with human  
 13 factors and water safety issues?

14 A. As I understand your question, I'm aware of many  
 15 journals that have to do with human factors. And within  
 16 those would be articles or topics pertaining to water  
 17 safety. But I don't know of any that would be human  
 18 factors that is exclusive to water safety.

19 Q. Dedicated to water safety?

20 A. No.

21 Q. You did understand my question, specifically both  
 22 parts of it, even though I only gave one question.  
 23 Have you in the course of your work on this case  
 24 reviewed any articles from any of those human factors  
 25 groups dealing with water safety?

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00051

1 A. No. I didn't feel I needed to for the purposes  
2 of my involvement in this matter.

3 Q. In connection with this case did you perform an  
4 accident reconstruction?

5 A. No, sir.

6 Q. In connection with this case did you form any  
7 opinions dealing with causation, that is, how this  
8 accident was caused?

9 A. Well, I think as I would use the term that's the  
10 overall focus of my analysis in risk management.

11 Q. Would you define human factors for me?

12 A. Human factors is the science that combines two  
13 seemingly disjointed sciences. On the one hand you have  
14 traditional engineering design, how do you design and  
15 operate a structure, a facility, a product. The problem  
16 with traditional engineering is that it doesn't always  
17 fully take into account humans, their limitations and how  
18 they're likely to interact with the product, service, or  
19 facility. So you turn to the science of human behavior,  
20 psychology. And if you temper the design with an  
21 understanding of human limitations and human expectations,  
22 then you can end up with a design that's easier to use,  
23 safer to use, less likely someone will get hurt.

24 Q. In connection with this case you're presenting  
25 expert opinions in the area of human factors; is that

00052

1 correct?

2 A. I think that's the broadest arena in which my  
3 work falls in, yes.

4 Q. In connection with this case did you form any  
5 expert opinions with respect to visibility issues?

6 MS. WATERS: Objection. Vague and ambiguous.

7 THE WITNESS: As I understand your question, the  
8 visibility issues that would be involved in this case in  
9 terms of is it physically possible versus is it likely  
10 perceived, yes, those are things that I took into account  
11 in my analysis. I think they're discussed in Exhibits 1  
12 and 2.

13 BY MR. REINKE:

14 Q. Did you perform any visibility analysis per se,  
15 that is, did you conduct any tests of visibility in  
16 different locations within Hanauma Bay?

17 A. I did not conduct any tests. I made observations  
18 while I was at the site for the purposes of this case.  
19 But I didn't conduct any literal tests.

20 Q. In connection with this case are you claiming to  
21 give any expert opinions with respect to lifeguard  
22 services?

23 MS. WATERS: Objection. Vague and ambiguous.  
24 Overbroad.

25 THE WITNESS: I think the work that I'm doing in

00053

1 risk management overlaps into that area. But that's not  
2 the focus of what my testimony is. I think when you start  
3 to get into the focus of lifeguard services you are now  
4 talking about the expertise of somebody like Mr. Ebro, at  
5 which point I would defer to him.

6 BY MR. REINKE:

7 Q. How about snorkeling, are you providing any  
8 expert opinions with respect to snorkeling in connection  
9 with this case?

10 A. The only opinions I can think of would be the  
11 ones that I discuss about the qualifications of Mr. Powell  
12 and Mr. Laughlin. That there was no evidence to indicate  
13 they were inappropriate for attempting to be snorkeling in  
14 the bay given their skill level of swimming and past  
15 experiences.

16 Q. Did you express any expert opinions in connection  
17 with this case with respect to physical ocean conditions?

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18 A. Other than what's listed in my report, no, sir.  
 19 Q. Have you ever had any formal training in  
 20 oceanography?  
 21 A. Not in oceanography, no, sir.  
 22 Q. How about in ocean sciences?  
 23 A. No, sir.  
 24 Q. Ever given any lectures?  
 25 A. No, sir.

00054

1 Q. Written any materials?  
 2 A. No, sir.  
 3 Q. Have you ever attended any lectures with respect  
 4 to ocean studies, that is, the current, waves, etcetera?  
 5 A. Not where that was the focus of the seminar. But  
 6 where that was included within the presentation, yes.  
 7 Q. You don't claim any specific expertise in that  
 8 area, do you?  
 9 A. No. I would defer to someone. I think it's Mr.  
 10 Lukas.  
 11 Q. Are you an expert with respect to the physical  
 12 causes of drowning?  
 13 A. I have general knowledge in that area above and  
 14 beyond the lay person, but I'm not -- That's not again the  
 15 focus of my expertise.  
 16 Q. Are you rendering any opinions in connection with  
 17 this case with respect to the drowning event and how it  
 18 occurred and why it occurred?  
 19 MS. WATERS: Objection. Vague and ambiguous.  
 20 Overbroad.  
 21 THE WITNESS: The literal act of itself, whether  
 22 it's a wet drowning or a dry drowning, the exact mechanics  
 23 of that, no, sir. But in terms of the broad picture of  
 24 the drowning, again that's the focus of my report.  
 25 BY MR. REINKE:

00055

1 Q. I appreciate you narrowing that for me. That was  
 2 my intent, to limit that question. I understand the whole  
 3 case is about this drowning, isn't it?  
 4 A. That's right.  
 5 Q. Do you have any expertise, particular expertise  
 6 in municipal operations?  
 7 A. Other than safety and risk management, no, sir.  
 8 Q. When you say safety and risk management, what do  
 9 you mean by that?  
 10 A. I evaluated and reviewed many safety and risk  
 11 management programs for various municipal operations.  
 12 Q. Do you have any specific training with respect to  
 13 the budgeting process in a municipality or any  
 14 governmental entity?  
 15 A. No, sir. No, sir.  
 16 Q. So you don't claim any expertise in that area, do  
 17 you?  
 18 A. No.  
 19 Q. Are you familiar with the term resource  
 20 allocation?  
 21 A. I am.  
 22 Q. What do you understand it to mean?  
 23 A. Same thing every one of us in everyday life  
 24 faces. You have a limited set of resources and you have  
 25 to allocate those according to your needs.

00056

1 Q. In connection with your work in this case did you  
 2 review any source materials that are not contained in your  
 3 file?  
 4 A. No, sir. Excuse me. If I can correct that. I  
 5 think we mentioned at the beginning of the deposition I  
 6 forgot to bring the videos that I reviewed.  
 7 Q. What were on those videos?  
 8 A. As I recall, there were two separate videos. One  
 9 was a compilation of news stories, I believe, was one of

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10 them. And the other one was a walk through of Hanauma Bay  
11 that, I believe, was shot by Scott Suzuki Jones from Ian  
12 Mattoch's firm.

13 Q. I saw some reference to that Tom Ebro created  
14 some type of a video. Do you recall anything that he  
15 might have prepared?

16 A. I don't.

17 MR. REINKE: I assume both of those videos have  
18 been turned over as part of discovery?

19 MS. WATERS: I assume too. Do you know? I don't  
20 know. I think we gave you everything.

21 MR. REINKE: I'll look at lunch and see.

22 Q. Are you able to tell me what you would consider  
23 to be any authoritative sources with respect to, or  
24 treatises regarding lifeguard services?

25 A. No. If you're going to talk about lifeguard

00057

1 services, that's somebody I would defer to would be Mr.

2 Ebro. That's not the work I'm doing in this case.

3 Q. The answer to my question is no, you don't know  
4 of any?

5 A. No, not off the top of my head. Just if I can  
6 fill in my answer to make sure I'm not leaving anything  
7 out for you because I never want to play hide the ball.  
8 Within that work I'm doing and lifeguarding  
9 services, what I would refer you to is the textbook by  
10 Peterson. It's Risk Management in Parks and Recreation  
11 Areas. That would be applicable to the work that I'm  
12 doing in this case, which obviously then begins that  
13 overlap with the lifeguarding services, which is a domain  
14 specific area that I would then defer to somebody like Mr.  
15 Ebro.

16 Q. Peterson?

17 A. I believe that's the author.

18 Q. Do you remember his first name?

19 A. I sure don't.

20 Q. You didn't refer to it in connection with this  
21 case?

22 A. I didn't pull my copy out and review it because  
23 I've spent 30 years with risk management so I know it  
24 inside and out. If you are asking for an authoritative  
25 text on how would you do risk management for something

00058

1 like lifeguarding services at Hanauma Bay, the starting  
2 point is risk management. And then I would turn to a book  
3 like Peterson.

4 When you get to specifics of traffic management,  
5 then you would go to a civil engineering type thing.  
6 Specific lifeguarding services you'd go to somebody like  
7 Mr. Ebro.

8 Q. In forming any of your opinions with respect to  
9 the number of lifeguards that you believe should have been  
10 present at Hanauma Bay on the day of the incident, did you  
11 perform any type of independent study of the lifeguarding  
12 services where you actually went out and collected data  
13 and then used that data to reach your opinions?

14 A. No. I just analyzed the data that I was  
15 provided.

16 Q. You didn't, for example, go to any of the beaches  
17 on Oahu for purposes of observing the lifeguarding  
18 services at those beaches?

19 A. No. Again, I just analyzed the data that I was  
20 provided.

21 Q. And are you a member of the Red Cross?

22 A. I am not.

23 Q. Have you ever been on a swim team?

24 A. I don't think so.

25 Q. You'd remember, honest.

00059

1 Have you been a member of any sports safety

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2 associations?  
 3 A. No, sir.  
 4 Q. Are there such things as associations of  
 5 individuals dealing with sports safety?  
 6 A. I believe there is, but I couldn't give you the  
 7 name of one off the top of my head.  
 8 Q. How about parks and recreation safety, are there  
 9 any associations dealing with that issue where you get a  
 10 group of people that are in that industry that have an  
 11 association or a group that come together to share common  
 12 experiences?  
 13 A. I would have to refer to the Peterson book to  
 14 identify those. I'm not familiar with those just off the  
 15 top of my head.  
 16 Q. Certainly you are not a member of one then?  
 17 A. No, sir.  
 18 Q. You indicated earlier in this deposition you'd  
 19 been to Hanauma Bay about six times in the last 15 years?  
 20 A. That would be my best estimate.  
 21 Q. An estimate could be plus or minus a few,  
 22 correct?  
 23 A. Correct.  
 24 Q. You don't keep a diary of everything you do, do  
 25 you?  
 00060  
 1 A. No, sir, I sure don't.  
 2 Q. On those six occasions, I'm going to use the word  
 3 six, we understand it's plus or minus a couple, on those  
 4 six occasions did you go with other people?  
 5 A. Not every time, but I would say most of the  
 6 times.  
 7 Q. Have you taken your family to Hanauma Bay?  
 8 A. I have.  
 9 Q. How long ago was that?  
 10 A. Well, I took my children there, I would estimate,  
 11 around 1995.  
 12 Q. How old were they at the time?  
 13 A. They were born in 83 and 86. So you can do the  
 14 math.  
 15 Q. I can.  
 16 A. So nine and 12 in round numbers.  
 17 Q. And did you take them snorkeling?  
 18 A. I did.  
 19 Q. Did you go outside the inner reef?  
 20 A. I believe the day that I was there with them we  
 21 did, yes.  
 22 Q. Have you ever gone into the Toilet Bowl?  
 23 A. I have not.  
 24 Q. Have you ever gone out to Witch's Brew?  
 25 A. I have not.  
 00061  
 1 Q. My question was the six trips that you were out  
 2 there.  
 3 A. That's correct.  
 4 Q. Have you ever gone --  
 5 A. I couldn't have gone there if I wasn't there.  
 6 Q. What we didn't discuss was your work in this  
 7 case. I'm assuming you went out to Witch's Brew in this  
 8 case?  
 9 A. No. It was closed off.  
 10 Q. You didn't walk out to the point?  
 11 A. No, sir. It was closed off.  
 12 Q. Have you ever then physically as a person looked  
 13 down into Witch's Brew?  
 14 A. Only from the approach that you come into Hanauma  
 15 Bay.  
 16 Q. So the closest you've come to the Witch's Brew  
 17 area then is four or 500 yards?  
 18 A. There's been a lot of estimates on the distance  
 19 from the shore. And I would estimate it to be on the



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20 order of a thousand feet if you are where the gate is or  
21 less from where the gate is.

22 Q. Let's defer the measurement until later.

23 Have you ever snorkeled out or swam out so you  
24 were parallel to the Witch's Brew area?

25 A. I can't tell you with certainty. I know I've

00062

1 gone well beyond the inner face of the outer reef, if that  
2 phraseology is meaningful to you.

3 Q. Well, it's meaningful to me, but it may not be  
4 meaningful to someone who may read this transcript.  
5 We've premarked before the deposition Exhibit 3.

6 I want to make a couple of representations for the record.  
7 This is a photograph of Hanauma Bay. I will admit I have  
8 no idea what year it was taken, what the weather  
9 conditions were like, or what the sea conditions were  
10 like.

11 This exhibit has been used in prior depositions  
12 in this case. This specific exhibit actually came from  
13 Mr. Dorr's March 17th, 2006 deposition. Because it's from  
14 somebody else's deposition, we have it with some marks  
15 already on it. I'm going to represent that on the top of  
16 the exhibit, on the beach there's an X. Do you see that  
17 marked with black?

18 A. I do.

19 Q. You didn't make that, did you?

20 A. No, sir.

21 Q. Now, at the bottom on the left-hand side there's  
22 a circle. Do you see that?

23 A. Out in the water.

24 Q. You didn't make that?

25 A. No, sir.

00063

1 Q. You don't know what those are intended to  
2 represent?

3 A. I could only speculate.

4 Q. Do you recall reading Mr. Dorr's deposition?

5 A. I do.

6 Q. At one time if you read the deposition -- And you  
7 had the exhibits present too, didn't you?

8 A. I'm not certain if I did or not.

9 Q. You may have been provided depositions without  
10 exhibits?

11 A. That often happens, yes, sir.

12 Q. Really. Okay.

13 You would have noted, in any event, in reading  
14 through his deposition that he made marks on this diagram,  
15 correct?

16 A. I don't specifically recall that level of detail  
17 from his deposition. But that's typically what happens.

18 Q. You would assume that that would be the case. So  
19 if you did read the deposition carefully and you had  
20 looked at that you would then know whether or not, or  
21 rather what those symbols represented, correct?

22 A. That's correct. That's why I said I could  
23 speculate what they are.

24 Q. Tell me what you think they are.

25 A. I would speculate that the X represents the

00064

1 lifeguarding tower, the one that most likely Mr. Moses was  
2 in, and Mr. Neves.

3 MS. WATERS: Neves.

4 THE WITNESS: I would speculate the circle is the  
5 location where, the general location where the second body  
6 was located.

7 BY MR. REINKE:

8 Q. whose body was that?

9 A. I don't recall the order that they were pulled  
10 up.

11 Q. I think it's fair to work with those two



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12 assumptions that that's what those marks mean from Mr.  
13 Dorr's deposition.

14 A. Okay.

15 MR. REINKE: Counsel, do you recall that being  
16 the case?

17 MS. WATERS: Vaguely. It was a year ago. But it  
18 doesn't sound wrong.

19 BY MR. REINKE:

20 Q. Do you recall what the designation was for the  
21 lifeguard tower, what the lifeguards called it?

22 A. You know, there was like a 3 1A and a 3B or  
23 something. Again, I didn't memorize which one was which.

24 Q. Let's assume, I think it's a fair assumption,  
25 that the X marked the lifeguard tower where Mr. Moses and

00065

1 Mr. Neves were. Can you identify on this map with your  
2 finger where the Witch's Brew point is?

3 A. Yes. That would be, if you connected the circle  
4 and the X, the protruding point of land, that line would  
5 intersect and would be the point of Witch's Brew.

6 Q. Can you identify the Witch's Brew ledge for me?

7 A. Well, if you start with that point and go  
8 counterclockwise around you can see where there's some  
9 shorelines. But the shoreline going counterclockwise  
10 around from that point would be where the ledge area is.

11 Q. How about the Witch's Brew area, can you tell me  
12 where that is on this map, or this photograph rather?

13 A. I would say that the circle is kind of the  
14 bull's-eye for it, if you will. It would be radiating out  
15 from that would be the general area. You can see how the  
16 shore starts to form an arch.

17 Q. Now, with regard to this area from where the  
18 beach ends right up here up to the Witch's Brew point, do  
19 you know what that area is referred to as?

20 A. Just so your record is clear, you pointed to the  
21 exhibit and said the beach area here, you were pointing to  
22 the beach that's on the left-hand side of the exhibit  
23 where it terminates into the shore.

24 Q. That's correct.

25 A. I don't recall the name of that area, no.

00066

1 Q. Let's use red so we can make sure that you've got  
2 the red markings. I'd like you to make a triangle where  
3 Witch's Brew point is where you've identified that for me.  
4 And then can you draw a line, a red line, along what  
5 you've identified as the Witch's Brew ledge.

6 A. Well, that would be the area --

7 Q. You've drawn a dotted line?

8 A. Correct. It's within that general region.

9 Q. Then the area that you are referring to as  
10 Witch's Brew, then would that be that body of water where  
11 the black mark at the bull's-eye and that body of water  
12 radiating out from there, correct?

13 A. Correct. More or less it's kind of in an oval  
14 shape as it appears on this photograph.

15 Q. We're not going to mark that because I can  
16 understand and it's pretty clear from your explanation.  
17 If at any point it becomes unclear, that you think we're  
18 talking about someplace else, please let me know.  
19 The coastline, I'd like you to mark it with a  
20 green marker, the area from where the beach terminates on  
21 the left-hand side up to Witch's Brew point. You're not  
22 sure what that's referred to; is that correct?

23 A. No. I would call it the ledge that leads up to  
24 the Witch's Brew.

25 Q. Why don't you go ahead and draw a green line on

00067

1 that. That's the ledge that leads up to Witch's Brew?

2 A. Right. There's a foot path or a trail along the  
3 ledge that leads up there.

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4 Q. When you went out there that was closed; is that  
5 correct?

6 A. That's correct.

7 Q. There was a physical barrier preventing you from  
8 going out there?

9 A. There was a gate with a fenced wing that hung out  
10 over the water and multiple warning signs.

11 Q. Now, on your snorkeling trips, now we're back to  
12 snorkeling, I had asked you before whether you ever had  
13 gone out to an area parallel to Witch's Brew so you could  
14 look into Witch's Brew.

15 A. Correct.

16 Q. Now that we have the photograph, does it refresh  
17 your recollection whether you ever went out into the area  
18 parallel to witch's Brew during any of your trips?

19 A. I would say most likely that I was past a tangent  
20 from witch's Brew point on one or more occasions.

21 Q. Is there a reef out there to look at?

22 A. Well, it depends on what you want to call reef.  
23 There is some area with some fish and some coral. And if  
24 you are snorkeling and you want to get away from the  
25 crowds, along the side the Toilet Bowl is on there is some

00068

1 areas.

2 Q. Are there any blank areas out there where there's  
3 nothing but sand?

4 A. I think you can see that in the photograph, yes.

5 Q. How about from your personal experience, do you  
6 recall that?

7 A. I do.

8 Q. On the six occasions that you were at Hanauma Bay  
9 prior to this case, had you ever walked out on the area of  
10 the pathway you've marked with the green line?

11 A. I don't believe so. I don't have a specific  
12 recollection of it.

13 Q. On the right-hand side of the photograph is the  
14 shoreline that leads out to Toilet Bowl, correct?

15 A. Correct.

16 Q. Had you ever been out on that path?

17 A. I don't recall having done so.

18 Q. On the days that you were at Hanauma Bay were  
19 there lifeguards present?

20 A. I never noticed one way or another. I would  
21 assume they would be. But I can't say I physically  
22 observed them other than the day I went there for the  
23 purposes of this case.

24 Q. On the days prior to that you didn't have any  
25 opportunity to observe the lifeguards of what they were

00069

1 doing; is that correct?

2 A. That's correct.

3 Q. Have you ever gone to a beach in Hawaii that is  
4 not guarded by lifeguards?

5 A. I would assume so, but again I don't really pay  
6 attention to whether there is or isn't a lifeguard there.

7 Q. Have you ever been to Hanauma Bay when you were  
8 told you could not go into certain sections of the bay?

9 A. Never.

10 Q. So as far --

11 A. Let me take that back. Nobody told me that I  
12 couldn't go to Witch's Brew. But when I attempted to walk  
13 around to the trail it was obvious that I was not  
14 permitted to go there from all the warning signs and the  
15 barricade that was set up.

16 Q. Prior to your work on this case had you ever been  
17 at Hanauma Bay where you were told you could not go to any  
18 part of Hanauma Bay?

19 A. Never.

20 Q. Do you recall reading Mr. Bregman's deposition?

21 A. I do.

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22 Q. Do you ever recall reading in there he said  
23 basically you could swim anyplace in the bay?  
24 A. I'm not disputing that. But I don't recall that  
25 specifically.

00070

1 Q. Let me ask you with respect to deposition  
2 testimony of -- Let's just start generally. You've read a  
3 number of depositions in this case, correct?

4 A. Correct.

5 Q. Did you give any particular weight to any  
6 deposition greater than you might have given to another  
7 deposition? In other words, you said this one is  
8 authoritative as compared to any of the rest of them?

9 A. As I understand your question, what I would say  
10 is certainly I would give more weight to policy and  
11 procedures to a person that's higher up, such as Mr.  
12 Bregman, for example, than I would to a person that is a  
13 Water Safety Officer 1, in terms of policies, procedures  
14 and so forth.

15 In terms of did I give more weight to people  
16 because this person seems so grossly inconsistent with the  
17 physical evidence and the rest of the testimony of all the  
18 other eyewitnesses in this case, no. I thought in general  
19 the testimonies were pretty consistent. The usual  
20 variability that you would find. But there was no one  
21 person that stood out as being an out liar to the rest.

22 Q. So you didn't make any credibility assessments in  
23 connection with your review of these depositions?

24 A. No. Actually I'd say the other way around. I  
25 saw nothing to suggest that there was any individual that

00071

1 I would not believe to be credible.

2 Q. Any discrepancies would be what you would  
3 characterize as the normal, we all see an accident, we all  
4 see it differently type of discrepancies?

5 A. Correct. For example, I know there was  
6 testimony, I think it was Goodwin, that said whenever we  
7 close area two or the outer area we post a sign at the  
8 kiosk. And Moses said no, we don't post a sign there.  
9 That's policy procedure difference. Somebody thinks they  
10 do things one way and somebody thinks they do it another.  
11 I think those kinds of issues become important in a case  
12 like this. But I can't resolve what the ultimate truth  
13 is.

14 Q. In formulating your opinions do you take into  
15 account those discrepancies and the credibility of each of  
16 those witnesses in terms of reaching your opinions?

17 A. Yes, I do.

18 Q. And in connection with this case did you find any  
19 of the witnesses to be more credible in terms of assisting  
20 you in forming your opinions than other witnesses?

21 A. No. Again, I could not see any witness that  
22 appeared to be an out liar. They all in my opinion were  
23 reasonably credible witnesses. It just points to in my  
24 opinion those type of conflicting testimonies that point  
25 to the inadequacies of the risk management program. In

00072

1 other words, there appears to be some procedure that's in  
2 place, but it must not be very structured or formalized  
3 since some people know it and some people don't. That's  
4 what I would attribute those kind of differences to as  
5 opposed to somebody that just wasn't credible.

6 Q. I want to stay with the issue of closing of areas  
7 and posting signs because you specifically referred to Mr.  
8 Goodwin, WSO Goodwin, saying there would be posting up on  
9 the kiosk when certain areas were closed; is that correct?

10 A. I believe it was.

11 MS. WATERS: Objection. I think he said Bregman.

12 BY MR. REINKE:

13 Q. Is it Goodwin or Bregman?

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14 A. I thought it was Goodwin that said signs were  
15 posted on the kiosk. I can look at my notes. It should  
16 be in my report.

17 Q. It is in your report and it is Goodwin. That's  
18 why you got it right the first time.  
19 Do you recall when WSO Goodwin stopped actively  
20 working at Hanauma Bay?

21 A. No, I do not. I know he was not stationed at the  
22 bay on the day of the accident because he brought the jet  
23 ski around.

24 Q. If he had been there several years before and  
25 didn't remember what the policies and procedures were,

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1 your understanding of someone who is currently working  
2 there, would you take that into account in formulating  
3 your opinions?

4 A. Well, yes. I think that's what's so telling.  
5 It's not that Goodwin is saying I don't remember us  
6 putting signs. It's the other way around. It's Goodwin  
7 saying when I was there a couple of years ago, when we  
8 closed the area we did put signs up. And now current day  
9 Moses is saying no, we don't put signs up. Well, in fact,  
10 they used to and they no longer, that would be a serious  
11 criticism of the risk management program, particularly  
12 given the increase in drownings that are occurring.

13 Q. Is there anything from your trips at Hanauma Bay  
14 prior to the investigation you did in this case, anything  
15 from those trips that you are utilizing in formulating  
16 your opinions in connection with this case?

17 A. Yes, I think there is.

18 Q. Can you tell me what those facts or factors are?

19 A. It's the general scheme type of things I  
20 discussed in my report. When you arrive there I think you  
21 have a lowered subjective risk. You start from being up  
22 high on the bay and you look down and it appears that it's  
23 placid and tranquil water, in part because the inner reef  
24 is and in part because you are elevated up.  
25 If you arrived down at the shore it is clearly a

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1 public beach. Lifeguard stands are prominent. You can  
2 see them. There's concessionaires that are there. You  
3 see people of all ages, elderly and young kids, all in the  
4 water. It's leads you to again a very lowered level of  
5 vigilance.

6 You feel like you are in a safe place because of  
7 the reef, the shore break is virtually non-existent, it's  
8 just water lapping up on the beach. So you truly do get a  
9 sense that you are in a placid, tranquil park and there is  
10 no need for a heightened level of vigilance.

11 The other thing that I recall distinctly all the  
12 times that I was there was never any encounters from any  
13 lifeguards, anybody advising me or warning me one way or  
14 another. Nobody telling me to go to the lifeguards. No  
15 signs directing me to the lifeguards. There was never an  
16 issue about where you would go and swim.  
17 People were on the outer reef in large numbers  
18 every time I've ever been there. I've never seen it where  
19 they've said don't go out there. Yet there have been  
20 times that I've been out there where there were pretty  
21 heavy seas on the outer reef. I'm a highly experienced  
22 scuba diver and snorkeler and been around water all my  
23 life. And I felt that it was okay for me to be there.  
24 But there are a lot of people that I saw there that  
25 appeared to me to be first time snorkelers or very

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1 inexperienced that I would agree with the safety manual  
2 that's given to the visitors' assistants that say the  
3 majority of the people that are out in that area have no  
4 business being there. That was my observation. I mean,  
5 that doesn't mean that none of them should have been

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there. There were people that were clearly very qualified and competent in their snorkeling ability. But there were ones that I was concerned about.

Q. Anything else that you recall, any fact or factor that you recall from your prior visits that you are taking into account in this case?

A. The huge number of people that were there. If you translate that into the number of functioning lifeguards, and their task of trying to monitor that many people, particularly when they're snorkeling, the tremendous difficulty that poses. You have one and a half lifeguards for several thousand people that are snorkeling at any given time.

Q. Anything else?

A. Not that I can think of, no. Another one just occurred to me. I think I again talked about this in my report. Unlike any other beach I've ever been to, you are surrounded by land. In other words, normally when you are snorkeling off of a beach you have land on one side and it's all water going out from there. Whereas, here at

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Hanauma Bay, no matter how far out towards the ocean you go you still have land on both sides. I think again that plays into that sense of security, that you are close to land. You're not going to get caught up into a riptide and pulled down the shore because you are surrounded by land.

Q. Are there any riptides in Hanauma Bay?

A. I have not experienced any. There are certainly what I recall experiencing the most is the huge surge going through the channel or the slot.

Q. That was a surge pulling you out, correct?

A. It depends on the tide. I'm trying to think. I believe most of the times that I can think of experiencing it it's the difficulty getting back in.

Q. The water is rushing out the slot, and getting back in can be a bit of a challenge?

A. Correct.

Q. Are you a member of ANSI?

A. I am not currently. I was during the late eighties when they were developing the Z 535 series.

Q. That is the warning signs series, correct?

A. That's correct.

Q. Were you on any of those committees?

A. I was an ad hoc member when the Z 535 series were being developed.

00077

Q. Did you do any specific work on the 535 series?

A. As an ad hoc member I would review drafts of the standards. But I was not in the active committee meetings that were generating them.

Q. You would give them back comments?

A. Correct.

Q. Were those comments published?

A. I don't think so.

Q. Who was the chair of the committee?

A. I don't recall. It's 20 years ago.

Q. Who was your contact?

A. I don't even recall that.

Q. Did you refer to the 535 series in preparation of any of your opinions in this case?

A. I think I might have referenced that in the report, saying that the signs that were there were not Z 535 compliant.

Q. Did you actually go back and reference the standard though to come to that opinion?

A. I didn't have to. I know the standard well enough that I can look at a sign and identify things that don't comply if there are. Sometimes it may get esoteric and I would have to look up the standards.

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24 Q. ANSI is a voluntary standard, correct?

25 A. Correct.

00078

1 Q. No entity is required to follow ANSI by any law  
2 that you are aware of?

3 A. I can't make an opinion of that one way or the  
4 other.

5 Q. How about the state of Hawaii, are you familiar  
6 with any statutes that mandate that entities comply with  
7 ANSI?

8 A. I'm not familiar with that one way or another.  
9 I've seen many government contracts that is required in  
10 the state of Hawaii that requires compliance with ANSI and  
11 ASTM, but not specifically the warning signs series.

12 Q. Nothing specifically with respect to 535 Z?

13 A. Not that I specifically recall. But I've not  
14 done a search of that.

15 Q. Do you know which governmental entity is  
16 responsible for providing lifeguards on the island of  
17 Oahu?

18 A. I think you asked me that earlier. No, I don't.  
19 I don't know the formal name. I'm sure it's in the  
20 discovery documents.

21 Q. Do you know if there is any obligation on behalf  
22 of the city and county or the state of Hawaii to provide  
23 lifeguards at any beach?

24 A. Are you asking me legally?

25 Q. Right.

00079

1 A. I have no legal opinions to offer.

2 Q. Are you aware of any unguarded beaches in the  
3 state of California?

4 A. I never thought about it one way or another.

5 Q. Do you know if private entities are required to  
6 provide lifeguards at beaches in the state of Hawaii?

7 A. I have no knowledge.

8 Q. Do you know who owns the beach?

9 A. Which beach?

10 Q. Well, any beach. Let's start with Hanauma Bay.  
11 Do you know who owns Hanauma Bay?

12 A. I do not.

13 Q. In connection with this case have you ever had  
14 any interaction with any current or former WSO's?

15 A. I have not.

16 Q. Have you consulted with any lifeguarding expert  
17 other than Mr. Ebro in connection with this case?

18 A. I have not.

19 Since you're on a new page and it's been two  
20 hours, can we take a short break?

21 MR. REINKE: Absolutely.

22 Off the record.

23 (Recess taken.)

24 MR. REINKE: Back on the record.

25 Q. When were you retained in this case?

00080

1 A. My billing records would reflect it. I don't  
2 know.

3 Q. The ones I'll be getting later?

4 A. That's correct.

5 Q. When was your first site visit?

6 A. The billing records would reflect that.

7 Q. How about your notes, would they reflect that?

8 A. No, sir.

9 Q. How many times did you perform site visits in  
10 connection with this specific litigation?

11 A. Just once.

12 Q. Do you recall how long you stayed at Hanauma Bay  
13 during that?

14 A. I was probably there, from when I pulled into the  
15 parking lot until when I left, a couple of hours. Maybe

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16 less. I'd be surprised if it was much more than that.

17 Q. And were you alone or was anybody with you?

18 A. I was alone.

19 Q. What was the weather like on the day you were  
20 there?

21 A. Nice, blue sky. May have sprinkled a little bit.  
22 But I think it was just more mauka showers blowing in than  
23 anything else.

24 Q. Wind?

25 A. Nothing of any substance.

00081

1 Q. How about the water conditions, flat, choppy,  
2 15-foot waves?

3 A. It was consistent with my typical experience  
4 there. The inner reef side was pretty placid. If you  
5 looked out far enough you could see some shore break  
6 splashing up hitting the rocks.

7 Q. When you say if you looked out far enough, were  
8 you referring to out in the area we marked with the red  
9 line on Exhibit 3?

10 A. Correct. If you looked out on the Witch's Brew  
11 side you could see the white spray coming out now and then  
12 out in the direction of Toilet Bowl. I don't recall one  
13 way or another if they were open or closed. I think it  
14 should show in my photos that I took. I think it may have  
15 been that Witch's Brew was closed where the red ink is  
16 written on the signs in the visitor center area. I think  
17 there is a photograph that showed that it was closed that  
18 day. The gate I distinctly remember being closed.

19 Q. Do you recall if there was strong ocean current  
20 on the day that you went to visit for your investigation?

21 A. I don't recall.

22 Q. Did you get in the water?

23 A. I don't recall that either. I didn't snorkel, I  
24 know that. I don't recall having gotten in the water.

25 Q. If I looked at your billing records would it

00082

1 reflect the amount of time you spent doing research, data  
2 collection and data analysis?

3 A. Yes, I think it would in the sense it tells you  
4 the general nature of what the task is that I did.

5 Q. It would also reflect how much time you spent  
6 preparing your report?

7 A. It would. I'm not going to use the same titles  
8 that you do of analysis and so forth. But it would tell  
9 you that I reviewed such and such deposition or that I  
10 generated summary notes from it or that I drafted a  
11 report.

12 Q. In terms of your formulating your opinions in  
13 this case, you did not do any research from authoritative  
14 source materials or any treatises or any articles; is that  
15 correct?

16 A. For the purposes of my work in this case I did  
17 not need to look up those types of documents. I was  
18 familiar with them enough because I do this work so much.  
19 If this had been the first case like this I've ever done,  
20 then I would have gone to the Peterson reference or the  
21 ANSI standards. Again, I've done this for 20 some years.

22 Q. Did you use any assistant in connection in this  
23 case to do any work for you?

24 A. No, sir.

25 Q. Do you recall having any conversations with any

00083

1 of the other experts retained by the Mattoch firm in  
2 connection with this case?

3 A. I recall one. I think that's all there was was  
4 one. It was a three-way phone conference, if you will.

5 Q. Who was involved in that?

6 A. Mr. Ebro. And I believe it's Mr. Lukas, the  
7 water current oceanography type person.



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8 Q. And yourself?  
9 A. And myself.  
10 Q. Any attorneys involved in that?  
11 A. I believe Ms. Waters was on the phone, but I'm  
12 not certain of that. I just remember the three of us  
13 specifically.  
14 Q. How long did that conversation last?  
15 A. If I had to estimate, I'd say over a half hour.  
16 I'd be surprised if it was an hour.  
17 Q. Did you make notes of that conversation?  
18 A. I did.  
19 Q. They would be contained in your file?  
20 A. They are.  
21 Q. Did you have that conversation before or after  
22 you wrote your report?  
23 A. I don't have a specific recollection. But my  
24 best estimate would be that it was beforehand. I think it  
25 was early on in my involvement in the case.

00084

1 Q. Is there anything that you can recall from that  
2 conversation that assisted you in formulating your  
3 opinions that are reflected in your report?  
4 A. Whatever it would have been would have been in my  
5 notes would be my best estimate.  
6 Q. Do you anticipate doing any further work in terms  
7 of formulating your opinions in this case?  
8 A. Nothing other than what we've already talked  
9 about.  
10 Q. Have you ever asked for any materials in  
11 connection with this case that you've not been provided?  
12 A. Not that I recall. Excuse me. I do. I think I  
13 asked if there was any material on the fourth lifeguard,  
14 and was told that the fourth lifeguard, I think Mr. Chun,  
15 is in Iraq, and that there was no deposition for him. But  
16 other than that, that would have been it.  
17 Q. Are you familiar with Act 190?  
18 A. If that's the one that I would refer to as the  
19 governor's task force on signs, is that in general what  
20 you are talking about?  
21 Q. Act 190 is a law that dealt with signage at  
22 beaches. Are you familiar with that?  
23 A. Again, not when it comes to legal issues. I'm  
24 generally familiar with the governor's task force for  
25 developing beach signs, but that's the extent of it.

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1 Q. Have you reviewed any materials relating to Act  
2 190?  
3 A. I have over time, the governor's task force. I  
4 can't specifically say yes or no about Act 190 because  
5 again I don't think of things in a legal sense. I think  
6 of them in terms of a safety and risk management  
7 perspective.  
8 Q. In connection with this work, this case, did you  
9 look at any materials relating to the governor's task  
10 force regarding beach signage?  
11 A. No, I don't believe I did. Again, I'm familiar  
12 with them.  
13 Q. Did you make any effort to calculate any  
14 distances at Hanauma Bay that were relevant to this case  
15 while you were at your site investigation?  
16 A. No, I didn't measure them or try to triangulate  
17 and compute. I just simply noted the distances and the  
18 level of visual acuity that you would have.  
19 Q. Based on your observations did you make any  
20 estimates of what the distance was or is between the  
21 lifeguard tower that's marked on Exhibit 3 with an X and  
22 the triangle which you identified as the Witch's Brew  
23 point?  
24 A. I would estimate it on the order of, in round  
25 numbers, at a thousand feet. Three football fields.



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00086

1 Q. And did you make any estimate of the distance  
2 that it would take if you took a land route -- And that  
3 was a straight line we're talking about via the ocean in  
4 my last question. If you took the ocean route, that would  
5 be about three football fields; is that correct?  
6 A. Line of sight is about three football fields. A  
7 thousand feet. Again, I didn't attempt to measure it.  
8 Q. How about if you were to take a land route, you  
9 go from the X, you follow the beach to the point where the  
10 green line starts here where the beach ends, and then you  
11 go all the way out to the point, did you try to draw any  
12 estimates of that distance?  
13 A. I would say just as an estimate if you look at  
14 that it's basically a right triangle. So knowing it's a  
15 right triangle, I would say it's on the order of 35 to  
16 40 percent greater if you went by land than line of sight.  
17 Q. That's that guy Pathagarus that taught us?  
18 A. You got it.  
19 Q. Have you reviewed Mr. Ebro's deposition?  
20 A. No, I have not.  
21 Q. Have you reviewed any of his notes?  
22 A. No, I have not.  
23 Q. Did you take any photographs when you went out  
24 there?  
25 A. I did.

00087

1 Q. Those are in your file?  
2 A. They're in the folder I gave you labeled notes.  
3 They're printed in a thumbnail. Then there's a CD that is  
4 photos and MPEG-4 video.  
5 Q. Do you anticipate in connection with your  
6 testimony in this case preparing any charts, diagrams or  
7 other types of exhibits to help illustrate your testimony?  
8 A. I haven't thought that far ahead.  
9 Q. Do you typically prepare any diagrams or exhibits  
10 to illustrate testimony?  
11 A. I don't think there's any typical when it comes  
12 to trial. I think it just depends on the facts of the  
13 case and what you are trying to convey to the jury.  
14 Q. You have in the past prepared exhibits and  
15 diagrams to illustrate your testimony?  
16 A. I have.  
17 Q. Has the work you've done to date been sufficient  
18 for you to render final opinions in this case?  
19 A. It's sufficient to render the opinions that I've  
20 done to date. I can't say final because if something new  
21 in discovery comes up that is directly relevant to my area  
22 of expertise and unique to the facts that I already have,  
23 then obviously I'd reserve the right to respond to that.  
24 Q. Absent that, your opinions, you've done enough  
25 work to have final opinions?

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1 A. I have. And they're expressed in my two reports.  
2 Q. They're intended to be your final opinions; is  
3 that correct?  
4 A. Based on the material that's available to date,  
5 yes, sir.  
6 Q. What date did this accident occur?  
7 A. I think it was July 19th, 2002.  
8 Q. You weren't in Hawaii at that time, were you?  
9 A. I have no idea.  
10 Q. So you don't have any personal knowledge of the  
11 conditions that day that you are relying upon in this  
12 case; is that correct?  
13 A. That's correct.  
14 Q. Do you recall from your review of the materials  
15 what the weather was like on the day of the accident?  
16 A. I think it was reported as being sunny. I think  
17 it was moderate winds with gusts of 20 something mile an

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18 hour. I think surf was one to four foot.  
19 Q. One to four foot in Hanauma Bay?  
20 A. I'm not saying literally in the bay itself, but  
21 that was the conditions that were reported.  
22 Q. Where was that reported?  
23 A. It's in the discovery material in weather data  
24 that was provided for that day.  
25 Q. Do you know what the water conditions were?

00089

1 A. Wet. I don't know what you mean by water  
2 conditions. It's pretty broad.  
3 Q. Do you recall what the underwater visibility was  
4 that day?  
5 A. I don't recall that, no.  
6 Q. Do you recall from your own experiences at  
7 Hanauma Bay the underwater visibility can be variable,  
8 some areas are real clear and some areas are not as clear?  
9 A. In general the outer reef is usually pretty good.  
10 The inner reef in my experience is generally pretty cloudy  
11 relative to the kind of snorkeling that I like to do.  
12 When the waters get a little heavier then even the outer  
13 reef can get cloudy at times.  
14 Q. Do you have any idea what the water visibility  
15 was on the date of the incident?  
16 A. Nothing other than just from the deposition  
17 testimony.  
18 Q. Do you know what the tide was at the time of the  
19 incident?  
20 A. I don't recall, no, sir.  
21 Q. Do you know if it was going in or coming out?  
22 A. I don't.  
23 Q. Is that a relevant factor what the tide was to  
24 any of your analysis?  
25 A. Not to my analysis. It might be to Mr. Ebro and

00090

1 Mr. Lukas. But not to my work.  
2 Q. Do you know what the overall crowd was at Hanauma  
3 Bay during the time that Powell and Laughlin were at  
4 Hanauma Bay?  
5 A. I seem to recall the total attendance that day  
6 was on the order of 3,700. The accident, as I recall, was  
7 right around noon, just before that. That would have been  
8 typically a pretty peak time out of that 3,700 people.  
9 People come in the morning and leave. People come later  
10 in the day. But I would say a reasonable estimate would  
11 be 2,000.  
12 Q. That's an estimate, correct?  
13 A. It's an estimate based on factual data that we  
14 have. And there was testimony, I think Mr. Bregman  
15 estimated it 1,500 to 2,000, I believe.  
16 Q. At what point in time did he estimate 1,500 to  
17 2,000 people were there?  
18 A. During the general time of when the incident  
19 occurred is what I recall.  
20 Q. Do you recall any facts about the crowds?  
21 A. I think various deponents said they were typical  
22 crowds for a nice day.  
23 Q. Of that 1,500 to 2,000 people, how many were on  
24 the beach?  
25 A. I wouldn't know.

00091

1 Q. How many were in the water?  
2 A. I couldn't tell you.  
3 Q. Do you know how many people were in Zone 1  
4 snorkeling or swimming?  
5 A. I do not.  
6 Q. Do you know how many people were in Zone 2  
7 snorkeling or swimming?  
8 A. The only estimate I recall was Ms. Powell saying  
9 it was upwards of 15 to 20 people at the time that the two

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10 men went out.

11 Q. And when Ms. Powell gave that estimate did you  
12 have any understanding of what she was referring to as  
13 being Zone 2?

14 A. My understanding is she was referring to what I  
15 call the outer reef area. I think that's what she was  
16 referring to in her deposition as opposed to the tidal  
17 Zone 2. So that's not counting people that are in the  
18 slot, for example.

19 Q. Do you know what Zone 3 is?

20 A. My understanding from Bregman's deposition is  
21 that's the deeper outermost area where you'd be scuba  
22 diving. There would be no reason to try to snorkel there  
23 because it's so deep.

24 Q. An area beyond Witch's Brew?

25 A. I would say it's the area across from Witch's

00092

1 Brew and across from the point where Toilet Bowl is would  
2 be my understanding from Bregman's deposition.

3 Q. Do you know how many people were in Zone 3?

4 A. I don't know.

5 Q. Do you know where the lifeguards were located at  
6 that time on the day of the accident?

7 MS. WATERS: Objection. Vague as to time.

8 BY MR. REINKE:

9 Q. Let me ask the question a little differently. Do  
10 you know where the lifeguard stands were located on  
11 July 19th, 2002?

12 A. I don't know precisely, but I know the general  
13 areas.

14 Q. Do you know if they've changed their location  
15 since the day of the accident?

16 A. I do not. I believe there's been another one  
17 that may have been added. But I don't know if they've  
18 changed locations.

19 Q. With respect to the location, physical location  
20 of the lifeguards, can you identify who was in the  
21 lifeguard tower closest to the Witch's Brew point at the  
22 time of the incident?

23 A. My understanding is that would have been Moses  
24 and Neves. That would have been on the Diamond Head side,  
25 if you will, the side closest to Witch's Brew.

00093

1 Q. Do you know where the other lifeguards were  
2 located at the time of the incident?

3 A. I don't know with certainty. I believe that's  
4 Dobbs and Chun. And we haven't gotten Chun's deposition.  
5 I don't recall Dobbs saying specifically that he was in  
6 the stand or not. I don't recall.

7 Q. And do you know if Mr. Neves had been any place  
8 in the slot on the day of the incident?

9 A. According to the interview that Major Maceo, his  
10 notes, the way I read those notes is that Mr. Neves had  
11 been in the slot earlier on a surfboard telling people  
12 that the outer area was closed and that they needed to  
13 stay in the inner reef.

14 Q. By the way, did you rely upon Major Maceo's  
15 interview notes in formulating any of your opinions?

16 A. Only the opinions that are expressed in my second  
17 report or Exhibit 2 because obviously I didn't have those  
18 at the time of my original report, or Exhibit 1.

19 Q. Did reviewing any of the materials that were  
20 contained in Mr. Maceo's report provide you with any  
21 information that made you want to change any of the  
22 opinions in your original report?

23 A. No. I'd say just the opposite. It corroborated  
24 those opinions. Provided some more evidence for them.

25 Q. Do you have any information that Mr. Powell or

00094

1 Mr. Laughlin were not advised by Mr. Neves not to go

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2 through the slot and out to the outer area?

3 A. Were not advised?

4 Q. Yes, were not advised.

5 A. I have no evidence about that one way or another.

6 Q. You couldn't testify in court that they weren't  
7 actually told that they should stay inside the reef on the  
8 day of the incident?

9 A. I have no evidence one way or the other.

10 Q. If they had been told they shouldn't go outside  
11 the reef and they chose to go out there anyway, would that  
12 impact on your opinions in this case?

13 A. Yes. If there was evidence that they had been  
14 verbally warned in the setting that you are describing,  
15 yes, I think that would.

16 Q. Now, let's talk just for a second about closing  
17 the ocean. Do you know if the WSO's have the authority to  
18 close any portion of the ocean?

19 A. You're asking me a legal opinion?

20 Q. Yes. I'm asking if you have any understanding of  
21 whether they have the authority to do that?

22 A. I don't know one way or another. As I recall in  
23 their depositions, it seems to me what they were saying is  
24 they could advise the manager of Hanauma Bay and that was  
25 the extent of their powers.

00095

1 Q. Do you know if they had any authority to detain  
2 individuals, that is, to stop them from going outside to  
3 the outer reef or to Witch's Brew or to Toilet Bowl?

4 A. I have no knowledge one way or another.

5 Q. Is it important to your opinions with respect to  
6 the activities of the WSO's to have an understanding of  
7 the limits of their authority in terms of addressing or  
8 preventing people from going into the areas of the ocean?

9 A. Not in relationship to the questions that you've  
10 asked so far, no, sir.

11 Q. How about in terms of your opinions in this case?

12 A. No. The opinions I think you see in Exhibit 1  
13 and Exhibit 2 are independent of those issues.

14 Q. You've indicated throughout the report, your  
15 reports, that certain areas of the ocean were closed; is  
16 that correct?

17 A. Certain sections of the waters in Hanauma Bay  
18 were closed, that's my understanding.

19 Q. Do you have any understanding of whether or not  
20 anybody had the authority to close sections of the water  
21 at Hanauma Bay?

22 A. Well, I don't know how you are using the phrase  
23 authority. But my understanding is if the water safety  
24 officers deem the ocean conditions to be unsafe, that they  
25 advise the manager and that the manager closes those

00096

1 areas, that the water safety officers are to dissuade  
2 people from going into those areas. I don't know if they  
3 can literally physically prevent them from doing that.  
4 I've seen on other beaches, such as Waimea for example,  
5 when big waves are coming in, when the water safety  
6 officers are going back and forth on their ATV's and  
7 repeatedly on loudspeakers and PA systems getting people  
8 away from the shore break and back off the ocean. I don't  
9 know if someone said no, I'm still going in. If they have  
10 the authority to take further actions or not, I don't  
11 know. They were obviously making a concerted effort to  
12 restrict people from being exposed to a hazard.

13 I think that's what Mr. Neves was doing,  
14 according to the interview with Major Maceo. Being out on  
15 the surfboard, the place where people have access to get  
16 out to the hazard, he was stationed out there warning  
17 people no, don't come out here. But obviously not very  
18 effectively since the three of them went out and snorkeled  
19 earlier in the day, and the other two gentlemen went out,

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20 and there were multiple people out there snorkeling.

21 Q. When you say not effectively, you mean his  
22 persuasion control was not that good, they didn't listen  
23 to him?

24 A. No. I think more likely the case is he wasn't  
25 there through the duration of the day.

00097

1 Q. Do you have any understanding of how long he was  
2 out there?

3 A. I do not.

4 Q. Once again we're both in agreement, you are not  
5 in a position to testify one way or another about whether  
6 Mr. Powell or Mr. Laughlin may have been told not to go  
7 out there and chose to go out there anyway, correct?

8 A. On the time when the two went out by themselves,  
9 that's correct. According to Ms. Powell's deposition  
10 there was no intervention prior. In fact, just to the  
11 contrary, according to her deposition, they specifically  
12 asked a park employee or someone they thought was a park  
13 employee how do we get out to a certain area, and they  
14 were told to go through the slot in the channel. So  
15 whatever evidence we do have is just the opposite of what  
16 you are proposing.

17 Q. Ms. Powell never went out through the slot?

18 A. She did go through the slot. She went out to the  
19 outer reef area. My understanding, initially all three of  
20 them were on the outer reef, the inner face of the outer  
21 reef.

22 Q. That would be, if we were to draw a line to  
23 bisect the bay from Witch's Brew point all the way across,  
24 the outer portion of the inner reef would then be the  
25 portion towards the top of the page?

00098

1 A. I would be even more specific than that.

2 Q. How much more specific would you be?

3 A. If you take what you just described, you can see  
4 the distinct breaking of a wave coming across the white  
5 water. You can see the distinct top line of the reef.  
6 That is the boundary between what I'm referring to as the  
7 inner reef. Anything from that point more mauka, anything  
8 from that line that we're talking about just slightly more  
9 makai is the inner face of the outer reef. That's where  
10 people like to go to snorkel because it's shallower, you  
11 can see lots of fish. There's live coral. If you go out  
12 much further than that, as you can see, you get big  
13 splotches of sand. It gets deeper. There's less things  
14 to see.

15 Q. Did you make any effort in connection with your  
16 evaluation of this case to determine what path Mr. Powell  
17 and Mr. Laughlin traveled on the day of the accident when  
18 they went out for their second snorkel?

19 A. I reviewed all the discovery material and came to  
20 the conclusion that I don't think anyone can say exactly  
21 which path. There's some testimony that suggests, I  
22 believe it was Neves that I believe suggested this,  
23 perhaps they had gone to Toilet Bowl and then came across  
24 to Witch's Brew. There's other testimony that, I believe  
25 it was from Moses and/or Neves, that said yeah, we saw

00099

1 them approaching the area. But they didn't say

2 approaching specifically from what direction.

3 So all the evidence suggests it's by water. But  
4 the exact path by water other than they went through the  
5 channel and the slot to go out, other than that I think  
6 it's an unknown.

7 Q. You indicated you thought there was testimony  
8 that someone said they saw both Powell and Laughlin  
9 approaching witch's Brew point, do you recall that?

10 A. Maybe they weren't that specific of seeing both.  
11 Maybe they just said yes, they saw someone may be more

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12 accurate.  
 13 Q. Do you recall if they saw them approaching it  
 14 from what angle Witch's Brew point?  
 15 A. Again, I don't think that level of detail was  
 16 provided.  
 17 Q. Do you recall Mr. Moses, WSO Moses testifying  
 18 that the first time he recalls seeing either of those  
 19 gentlemen was when one of them was swimming around Witch's  
 20 Brew point from Witch's Brew?  
 21 A. I don't recall it being from Witch's Brew, no,  
 22 sir.  
 23 Q. Where do you recall it being from?  
 24 A. I recall something in general about around  
 25 Witch's Brew point. But I don't recall it, as I

00100

1 understood your question, coming back from Witch's Brew  
 2 towards the beach. I don't recall somebody describing it  
 3 in that manner.  
 4 Q. How about coming around Witch's Brew point and  
 5 coming along the ledge you marked with a green line, do  
 6 you recall that testimony?  
 7 A. I don't recall it being that specific, no.  
 8 Q. So based on your recollection you don't recall  
 9 whether WSO Moses saw a swimmer going into Witch's Brew or  
 10 coming out of Witch's Brew, correct?  
 11 A. I don't recall him saying coming out of Witch's  
 12 Brew.  
 13 Q. Was it your impression then he saw the swimmer  
 14 going into Witch's Brew?  
 15 A. I don't know that I formed an impression one way  
 16 or the other.  
 17 Q. Is that relevant to your analysis, whether the  
 18 swimmer is going into Witch's Brew or coming out of  
 19 Witch's Brew?  
 20 A. No, sir, it's not. They never have been that far  
 21 out to start with. The question in my mind is if you know  
 22 this is such a dangerous area, it's been closed for  
 23 several days, you've gone to such great lengths to  
 24 barricade it by land, why are you letting people swim  
 25 these huge distances to go over there.

00101

1 Q. The barrier, do you know if that barrier is  
 2 permanent now or not permanent?  
 3 MS. WATERS: Objection. Vague.  
 4 THE WITNESS: There's a gate on the barrier. I  
 5 don't know the extent to when the gate is or is not open.  
 6 BY MR. REINKE:  
 7 Q. Was there a gate there on the day of the  
 8 accident?  
 9 A. I don't know that there was a gate. I know Neves  
 10 described something about nylon fencing was the phrasing  
 11 that I believe he used for it, that he had just gotten to  
 12 the fencing when he last observed the individual falling  
 13 back into the water. I think he described it as seeing  
 14 fear in his eyes or something.  
 15 Q. Can you tell me on the day of the incident what  
 16 buoys were present in Hanauma Bay?  
 17 A. No. Again, the record is not real clear on that.  
 18 My understanding was in general that there were buoys in  
 19 the slot. But beyond that the word again is cloudy.  
 20 Q. Do you know what standard is used to close  
 21 Witch's Brew?  
 22 A. Standard or criteria?  
 23 Q. Criteria, certainly.  
 24 A. I know there's a number of things. In general  
 25 the water safety officers observe the ocean conditions and

00102

1 make a determination whether or not they think it's safe  
 2 for individuals to be out there. Obviously the size of  
 3 the waves and the amount of water that's coming up over

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the ledges, current conditions would all go into that.

Q. Do you recall reading that anyplace?

A. I don't recall a formalized protocol by which they arrive at that conclusion, no.

Q. Do you recall ever anybody asking the WSO's under which conditions they would determine it's appropriate to close Witch's Brew?

A. I don't recall that specific question, no, sir. I'm not saying it's not there. I'm just saying I don't specifically recall it.

Q. You don't have any evidence or data from which to base an opinion as to whether or not there were sufficient conditions to close Witch's Brew point on the day of the incident?

A. No, I would disagree with that. The record is, I think, absolutely clear that Witch's Brew area was closed on the date of the incident. Bregman makes that absolutely clear. And I think that's clear in Moses' deposition. I didn't see any water safety officer that contradicted that and said no, the area was open. Every single one of them said it was closed, to my knowledge.

Q. The question is a little different. I'm talking

00103

1 about the criteria for closing Witch's Brew. No evidence to show those criteria were met on that day, is there?

A. Again I would respectfully disagree with that. I don't think every one of these water safety officers, management level people would close Witch's Brew if the conditions were such that it was warranted to be closed. That, therefore, leads to the conclusion that there was physical conditions that they used and observed to say it's unsafe, we're going to close it.

Q. What does it mean to close Witch's Brew?

A. As I understand it, what that means is you're to restrict access by land and restrict access by water. That it's deemed to be dangerous and unsafe, and people shouldn't be there.

Q. We've already discussed they didn't have the authority to keep people from going out there; is that correct?

A. No. I have no opinion on that one way or another. I don't have legal opinions. I don't know what their legal restrictions were or were not.

Q. I'd like you to assume for purposes of this question that they did not have the authority to physically restrict people from going to that part of the ocean.

A. Okay.

00104

1 Q. Making that assumption, can you tell me what they could have done to prevent Powell and Laughlin from going over there?

A. Yes. I think exactly what Neves did, according to his interview with Major Maceo, you station a figure of authority in a position to warn people that it's a dangerous condition. We're not talking about drunk teenagers here. We're talking about responsible 30 some year old adults that are there with their sister and wife. I believe if you had informed them of the hazards, that would have been sufficient. Now, had you done that and then they still chose to go, that's a different issue. I don't know what you can do in that situation.

Q. If when Mr. Powell and Laughlin, Mr. Laughlin had walked into Hanauma Bay there had been a sign posted that said Witch's Brew closed, and they had seen that sign, and they knew where Witch's Brew was, would you then agree that they assumed the risk of going into Witch's Brew?

A. Boy, those are some big assumptions.

MS. WATERS: Objection. Incomplete hypothetical.

THE WITNESS: You are assuming they would have



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22 seen the sign, would have read it, and somehow would know  
23 where Witch's Brew was, you are going to assume all of  
24 those things?

25 BY MR. REINKE:

00105

1 Q. I don't think it's a miracle to assume where  
2 Witch's Brew was since there's signs on the way down there  
3 that point it out pretty clearly. I would like you to  
4 make those three assumptions, there was a sign up there  
5 that it was closed, that they walked by that sign and had  
6 the ability to perceive it, whether they read it or not,  
7 they had the ability to perceive it, and they then chose  
8 to go out to Witch's Brew, whether they received a verbal  
9 warning or not. Would you agree that they assumed that  
10 risk of going into Witch's Brew?

11 A. First of all, you started with the signs are  
12 there and obvious. I've been to Hanauma Bay at least half  
13 a dozen times and I never once saw a sign that said  
14 Witch's Brew. I never once knew that there was a place  
15 called Witch's Brew. First of all, I disagree with that  
16 part of your statement.  
17 Secondly, it doesn't tell what the hazards are.  
18 Simply saying this is Witch's Brew and it's closed does  
19 not mean it's closed for danger. It doesn't mean it's  
20 closed because it's unsafe. It doesn't mean it's closed  
21 because you can drown. It may mean it's closed like they  
22 do with Hanauma Bay, close it one day a week for the  
23 safety of the marine life.  
24 So just simply that sign does not therefore lead  
25 to they assumed the risk. To then go further to say oh,

00106

1 they saw the sign and then they perceived and then they  
2 processed it. Your own expert produced studies that say  
3 16 percent in some studies of beach goers even see a sign.  
4 Your own expert says you could put millions of signs on  
5 this beach and it wouldn't have changed the outcome.  
6 No, I don't think they assumed the risk if you  
7 assume all the things you put in your hypothetical.  
8 There's just no basis for that.

9 Q. Do you think there's any set of conditions that  
10 would exist that would allow Witch's Brew to be open?

11 MS. WATERS: Objection. Vague.

12 THE WITNESS: That's beyond the scope of anything  
13 that I've been asked to do.

14 BY MR. REINKE:

15 Q. Do you think from your human factors perspective  
16 that if a person sees white water breaking against a  
17 ledge, that that puts them on notice that there is rough  
18 ocean conditions near that white water?

19 MS. WATERS: Objection. Lacks foundation.

20 THE WITNESS: What do you define by rough ocean  
21 conditions? waves splashing? Well, of course. Something  
22 that there's a hazard or danger, my goodness, no.  
23 All you have to do is spend a little time here in  
24 Hawaii and you can appreciate the extent tourists  
25 unknowingly go out and say oh, photo opportunities, stand

00107

1 here and I'll get the spray behind you. They have no idea  
2 about waves coming in sets and about variability in the  
3 ocean. I've seen it repeatedly where you see the  
4 lifeguards warning people of get back, get away, get out  
5 because it's dangerous. And they don't appreciate that.

6 BY MR. REINKE:

7 Q. You used the word hazardous ocean conditions in  
8 your report frequently. Would you tell me what you mean  
9 by hazardous conditions at Hanauma Bay?

10 A. At Hanauma Bay in general?

11 Q. Yes.

12 A. Well, that's a pretty broad question.

13 Q. It goes to the heart of this case. Since you've



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14 used the term I want to know what you mean by it.  
 15 A. What I mean by the heart of this case, the fact  
 16 the water safety officers knew the conditions were such is  
 17 that it was unsafe for people to be out in the outer reef  
 18 area, much less Witch's Brew. That's what I mean by  
 19 hazardous conditions.  
 20 Q. What were the ocean conditions that were  
 21 hazardous?  
 22 A. You'd have to talk to the water safety officer.  
 23 I wasn't there. But I understand it was a combination of  
 24 swell, waves, and currents that made it hazardous to be in  
 25 that outer reef area.

00108

1 Q. Do you have any understanding what makes Witch's  
 2 Brew hazardous?  
 3 A. Several things. One is you are so far removed  
 4 from a guarded area in terms of the lifeguards having  
 5 ready access. Another reason is the topography of  
 6 shoreline and the bottom and the ocean currents and waves.  
 7 I think one of the water safety officers described it as a  
 8 washing machine effect. Water has vertical rises and  
 9 falls, kind of what you get in a toilet bowl. Even for a  
 10 good, experienced swimmer, once you get in it it's a  
 11 struggle. As I think Lukas indicated, even if you are on  
 12 a surfboard you can be in there and it's dangerous and  
 13 hard to get out.  
 14 Q. What makes it dangerous?  
 15 A. The potential for drowning. The potential for  
 16 being thrown up against the rock shore. The difficulty of  
 17 a lifeguard coming to your aid. The fact that it doesn't  
 18 appear to be dangerous until you get into the situation  
 19 and then you realize once you're there, too late, you're  
 20 in a dangerous condition. In other words, it's what we  
 21 call a hidden hazard.  
 22 Q. You say in your opinion it's a dangerous  
 23 condition. What's dangerous about it? From a physical  
 24 point of view what makes that area of the ocean dangerous?  
 25 A. I've described to you as best as I can. I would

00109

1 say beyond that you are now starting to get into an area  
 2 that would be more appropriate to talk to somebody about  
 3 in terms of water safety or oceanography. I'm here to  
 4 talk about safety and risk management.  
 5 Q. In terms of hazardous conditions, it's only  
 6 hazardous in this instance because of your belief that the  
 7 outer reef was closed that day; is that correct?  
 8 A. No. I think it's the other way around. The fact  
 9 that it is unanimous from the water safety officers that  
 10 Zone 2 and Witch's Brew was closed and it was closed  
 11 because it was dangerous conditions, they talked about it  
 12 being rough, about it being choppy, they talked about  
 13 people shouldn't be out there. They overtly tried to warn  
 14 people not to go out there, at least at one point in time.  
 15 Those are the things that have led to my opinion  
 16 okay, it's been established that this is a hazardous  
 17 condition and they don't want people there. Now, did they  
 18 do proper safety protocol in light of all the drownings  
 19 they had and in light of those conditions, that's where my  
 20 opinion starts to pick up.  
 21 Q. I'm still a little hung up on the hazardous  
 22 condition though because all I heard you say is because  
 23 they thought it was unsafe, it was a hazardous condition.  
 24 I still can't figure out is it the current that's  
 25 hazardous, is it the sharks, is it the choppy water that's

00110

1 hazardous?  
 2 MS. WATERS: Objection. Asked and answered.  
 3 THE WITNESS: I would say two things. One, I've  
 4 done the best I can to answer it. And two, it's not  
 5 relevant to my opinions. I don't know why I can't seem to

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6 communicate that issue to you. I'm happy to sit here and  
7 talk with you all day, but it's not relevant to my  
8 opinions. Your people, the defendants, have said we  
9 closed the area, it was dangerous. It's not up to me to  
10 go through and analyze all the reasons why it was  
11 dangerous. That's an accepted fact.

12 BY MR. REINKE:

13 Q. Are there levels of danger in any situation?

14 A. Yes, there are.

15 Q. Do you know what level of danger was assigned to  
16 that specific day at Hanauma Bay?

17 MS. WATERS: Objection. Lacks foundation. Vague  
18 and ambiguous.

19 THE WITNESS: I don't know that I read anywhere  
20 where they had levels of danger. They didn't quantify it.  
21 From a safety perspective the level of danger is extreme  
22 because the potential risk is death and because the  
23 potential hazard is relatively hidden. So from a safety  
24 risk perspective this is an extraordinary high level of  
25 danger.

00111

1 BY MR. REINKE:

2 Q. When you say the conditions are hidden, what do  
3 you mean?

4 A. That to the typical tourist that was there about  
5 to engage in the activities that were intended it's not  
6 open and obvious that they're exposing themselves to a  
7 life threatening risk. I think that that was clear in  
8 Mrs. Powell's deposition when she said they didn't  
9 perceive they were in any danger at all when they were out  
10 there snorkeling, and when they come back in and when the  
11 two men went back out there then again they didn't  
12 perceive them to be in any danger.

13 When you arrive at the top it's a placid looking  
14 area, the water is calm along by the shore. You got old  
15 people, you got little kids in diapers that are swimming.  
16 You got lifeguard stands. There's nothing there that  
17 speaks to danger. What white spray you see if you happen  
18 to perceive it is estimated on the order of a thousand  
19 feet away. It's not going to look very big or significant  
20 to you at all.

21 Q. If you are snorkeling parallel to Witch's Brew,  
22 do you think the ocean conditions, the rockiness, the  
23 chopiness is something that would put you on notice that  
24 you are getting into an area where the conditions are  
25 going to be different than they are outside the Witch's

00112

1 Brew area?

2 A. Puts you on notice as being so salient that you  
3 can't help but notice it, no, not necessarily. Even if  
4 it's different, that doesn't mean it's unsafe.

5 Q. Would it be safe or unsafe for people, different  
6 people of different skill levels?

7 A. What is your question again?

8 Q. Would it be safe or unsafe based upon your skill  
9 level as a swimmer or snorkeler?

10 A. Based on what I understand the conditions of that  
11 day, it would not be safe to be snorkeling there no matter  
12 how good you were.

13 Q. How about swimming there?

14 A. I think you're better off with snorkeling with  
15 having fins on than just swimming.

16 Q. Would you say it's unsafe and potentially a  
17 dangerous hazard for anybody to be in the Witch's Brew  
18 area on days when the conditions are like or worse, would  
19 that be your opinion?

20 A. Based on what I understand the conditions to be  
21 that day, yes, I would say it would be unsafe to be  
22 swimming in the immediate vicinity of Witch's Brew within  
23 that area that we've talked about the bull's-eye being.

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24 Q. If the lifeguards did not close Witch's Brew that  
25 day would your opinions be different?

00113

1 A. I can't tell you they'd be different. I would  
2 tell you I have to do more work in order to determine  
3 whether or not there was a dangerous condition that  
4 existed and they just failed to close it. But I don't  
5 have to do that analysis because the lifeguards have done  
6 that analysis for me.

7 MR. REINKE: Let's take lunch.  
8 Off the record.

9 (Lunch recess taken.)

10 (Mr. Mayeshiro leaves deposition proceedings.)

11 MR. REINKE: Back on the record.

12 Q. I want to pick up where we were before talking  
13 about the waves and talking about Hanauma Bay. With  
14 respect to Zone 2 of Hanauma Bay, do you know under what  
15 conditions that zone would be closed to the public?

16 A. No. I just have the general description. I  
17 would defer to the lifeguards again.

18 Q. In terms of wave height, visibility or wind  
19 speed, you don't know at what point they make the decision  
20 that that zone should be closed, correct?

21 A. That's correct.

22 Q. You are not aware of any specific protocol for  
23 the closing of Zone 2; is that correct?

24 A. I didn't see anything that was a quantified  
25 protocol that said if this criteria is met we close. That

00114

1 is correct.

2 Q. You don't know or you're not aware there are  
3 levels of closure, that is to say could be closed for some  
4 purposes and not for others; is that correct?

5 A. Well, I know they close the entire bay, for  
6 example, to let it rest. But beyond that, no. I just  
7 know the state that it was in on the day of the accident.

8 Q. Have you ever heard of closure as a means of  
9 persuasion control?

10 A. I would say the process by which one closes may  
11 be persuasion control. But I would say closure would be  
12 more safety by design because you are eliminating the  
13 person from the event of the hazard.

14 Q. You base some of your opinions in this case in  
15 your report on the fact that the outer reef was closed,  
16 correct?

17 A. That was my understanding.

18 Q. You based your understanding of the outer reef as  
19 everything past the slot?

20 A. That's not the phraseology I've been using. I  
21 wouldn't call Witch's Brew, for example, the outer reef.  
22 When I have been referring to the outer reef, it is the  
23 description that we went through on Exhibit 3, with the  
24 breaking waves and the reef line and everything just makai  
25 of that as the inner face of the outer reef.

00115

1 Q. So everything that is towards the bottom of this  
2 exhibit after the break line, would that be inner reef or  
3 outer reef?

4 A. Everything that is beyond the breaking waves at  
5 the bottom of the picture on Exhibit 3 is outwards. But I  
6 wouldn't call, for example, the black circle on Exhibit 3  
7 outer reef because there's really not a reef there. It's  
8 just when I use the term outer reef I think I've always  
9 been trying to use it with regards to the area where there  
10 is a reef where people do snorkel.

11 Q. I think we're on the same wavelength. So part of  
12 your opinion is based upon the closure of the outer reef  
13 on the day of the incident, correct?

14 A. Everything from the outer reef and beyond was  
15 closed.

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16 Q. In your own mind did you question why there would  
17 be 15 to 20 people out in the outer reef at that point in  
18 time when Mrs. Powell testified that Mr. Powell and Mr.  
19 Laughlin went out?

20 A. Yes.

21 Q. What conclusions did you draw?

22 A. My conclusion is that's consistent with the  
23 inconsistencies of the defective risk management program.  
24 Let's face it, if you take the testimony of the water  
25 safety officers, it's dangerous to be out there. The

00116

1 conditions are dangerous. People shouldn't be there, and  
2 yet they're there.  
3 In my 20 years of experience being here in Hawaii  
4 I have never once seen a person refuse to obey the  
5 instructions from a figure of authority, like a lifeguard.  
6 I mean, you have led me to believe that perhaps they don't  
7 have the authority to arrest or detain or enforce. But I  
8 got to tell you the average tourist doesn't know that. I  
9 don't even know that as much as I've been here. So if the  
10 lifeguard says get back, it's dangerous, it's closed, you  
11 can't go in, I got to tell you I'm hard pressed to believe  
12 that 15 people would say the heck with you, I'm going out  
13 anyway.

14 Q. Does it lead you to believe that maybe the outer  
15 reef wasn't closed that day?

16 A. Given the testimony of all the water safety  
17 officers in this case, no, sir, it doesn't lead me to  
18 believe that at all.

19 Q. Do you recall if it was recorded anyplace, not in  
20 testimony, but recorded in any document that Zone 2 was  
21 closed?

22 A. I don't know if it's ever documented period.

23 Q. Is it documented anywhere that Witch's Brew was  
24 closed?

25 A. I don't know if it was or not.

00117

1 Q. Have you ever heard anybody state that what was  
2 really closed was Witch's Brew ledge, and not the Witch's  
3 Brew area?

4 A. I don't recall having read that either.

5 Q. Do you draw any distinction between those, the  
6 Witch's Brew ledge and the Witch's Brew area?

7 A. I think the ledge is a subset of area.

8 Q. You don't have any opinion today as you sit here  
9 today about whether the currents that were present at  
10 Hanauma Bay on the day of the incident were unusually  
11 strong, do you?

12 A. I have no opinions one way or the other.

13 Q. Do you know if the current had any impact on this  
14 accident?

15 A. I would defer to Mr. Lukas' testimony on that.

16 Q. Do you have any opinion as to whether or not the  
17 washing machine effect in the Witch's Brew area that's  
18 been described by at least one of the witnesses would have  
19 been an open and obvious condition to anybody that was  
20 approaching Witch's Brew?

21 A. Yes, I have an opinion on that.

22 Q. What is your opinion?

23 A. I think if one is approaching it by water and is  
24 swimming and is snorkeling and has their face down most of  
25 the time, and they're in an area that has got thousands of

00118

1 people around, I do not believe it would be open and  
2 obvious.

3 Q. Well, how about if they're out in Zone 2 where  
4 there's at most 20 people around, and presumably not  
5 anywhere near them, would it be open and obvious at that  
6 point?

7 A. No. The reason I said thousands of people around

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is that, as we talked about earlier in the deposition, it lowers your sense of risk of the area when you see so many people of all ages, you believe yourself to be, if you are a 30 some year old fit adult that is a very experienced swimmer and snorkeler you don't perceive yourself to be in an area that you are exposed to any risk. It's not that there's a thousand people all around you. You're in a bay where there's thousands of people swimming and snorkeling.

Q. When you leave Zone 1 and go into Zone 2 does your schema change at all?

A. No. You and I know there's a Zone 1 and Zone 2. Water safety officers know there's a Zone 1 and Zone 2. But the typical tourist that's there doesn't know. I didn't and I've been there a half dozen times until this case.

Q. Does the typical tourist know there's a place where most of the people snorkel and there's a place outside?

A. I don't think they would necessarily categorize it as places. What happens is you show up at the beach to go snorkeling, and you see, as you typically see on any beach, the densely populated area is closer to the shore, the further out you go the less denser it becomes. I don't think they would distinguish it as areas.

Q. Would a typical snorkeler realize that when they went outside the reef there would be less people there?

A. I don't think they would view it as outside. Again, they haven't been there before. What they view it as is a bay. It's a flat entity to go snorkel. And they would just happen to notice, as typical on a beach, the further out you go the fewer people.

Q. Didn't they ask how to get outside to the outer reef?

A. After they came back in they asked how to get out, yes.

Q. At that point they drew a distinction between the inner portion and outer portion?

A. That's correct.

Q. After they came back in they asked to get out to the outside. Did that raise a question in your mind whether they had gone to the outside during the first snorkel session?

A. I think there's mixed testimony on that in terms

of whether they're inside or outside. I think part of this nomenclature of Zone 2. They may not have been on the outside as I've referred to it as the outside.

Q. So they said to somebody how do I get out through that slot to go to that other area to snorkel, correct?

MS. WATERS: Objection. Misstates the testimony.

THE WITNESS: I don't think they said slot. I don't think they knew there was a slot. If they knew there was a slot I don't think they'd be asking that question.

BY MR. REINKE:

Q. They said how can I get to this outer area?

A. That was my understanding from Ms. Powell's deposition.

Q. Once again, a person then would be able to realize there was more than one area to snorkel?

MS. WATERS: Objection. Calls for speculation.

THE WITNESS: I think again I wouldn't say -- we're taking phraseology that we're paraphrasing. I don't know they said outer area. They may have said we've heard there's turtles. Where can we go to get them or how do we get to here. I don't know that they're in their mind's eye phrasing it as areas. It's more location.

BY MR. REINKE:

Q. When they leave the inner reef and they get to

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00121

1 the outer reef on the day in question, there was more  
2 water turbulence; is that correct?

3 A. I would expect there would be, yes.

4 Q. Does that put the snorkeler on notice that the  
5 conditions are different from the inner reef to the outer  
6 reef?

7 A. Different in what respect? Different as in  
8 there's more turbulence, yes. Different as in safe and  
9 unsafe, no.

10 Q. If there's a current that's pulling them out  
11 through this slot, does that put them on notice that  
12 there's strong current in the bay?

13 A. It may or may not. It depends on their level of  
14 perception and what they're doing as they're going  
15 through. I know the first time I went out I didn't  
16 appreciate the strength of the current until I tried to  
17 return.

18 Q. As a snorkeler do you have any obligation to look  
19 where you're going?

20 A. Define what you mean by look where you're going.  
21 Not run your head into an exposed rock or a piece of  
22 coral, yes.

23 Q. How about in the bay itself, do you want to be  
24 aware of where you are in the whole bay as a snorkeler?

25 A. Generally speaking, yes.

00122

1 Q. Because a person has to know their limits,  
2 correct?

3 A. Well, yes. But if you know that your limits are  
4 well beyond anything that you are in, then you don't have  
5 to be as vigilant with what you are doing as opposed to  
6 somebody who is a weaker swimmer.

7 Q. So a stronger swimmer could go out in those  
8 conditions and not be as aware than a weaker swimmer; is  
9 that correct?

10 A. Absolutely.

11 Q. Everybody, strong or weak, knows that the farther  
12 you go from the beach the farther you are from the  
13 lifeguards; is that correct?

14 MS. WATERS: Objection. Calls for speculation  
15 and overbroad.

16 THE WITNESS: If you consciously stop and think  
17 about that you would come to that conclusion, that's  
18 correct.

19 BY MR. REINKE:

20 Q. There's no two ways about it, if you are farther  
21 from the beach you are farther from the lifeguard, right?

22 A. But you have to stop and consciously think about  
23 it.

24 Q. I'm just talking about in reality. You go  
25 farther from the beach you're farther from the lifeguards;

00123

1 is that correct?

2 A. No. If there's lifeguards that are stationed out  
3 on the outer reef, no, that's not true.

4 Q. There's no lifeguards on the outer reef. Only  
5 lifeguards in the towers. The farther you are from the  
6 beach the farther you are from the lifeguards, correct?

7 A. That's a given from the nature of your question.

8 Q. And so either consciously or subconsciously if  
9 you are farther away from the beach you know you are  
10 farther from the lifeguards, right?

11 A. Only if you assume there's no lifeguard stationed  
12 out in the water. Again, that may be something that's  
13 physically true, but it doesn't mean that it's something  
14 you are conscious of.

15 Q. Do you know what kind of equipment Mr. Powell and  
16 Mr. Laughlin were using on the day of the incident?

17 A. I don't know the details of it. I just know that

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18 they were using face masks, fins and snorkels.

19 Q. Do you know where they obtained those face masks,  
20 fins and snorkels from?

21 A. I do not. I believe they brought it with them,  
22 but I'm not certain on that.

23 Q. Do you know if they had ever taken any courses in  
24 snorkeling?

25 A. I don't know about courses. I know that they've  
00124

1 done snorkeling on multiple times in the past. But I  
2 don't know about courses.

3 Q. How many times had they snorkeled in the past?

4 A. I don't recall. I think Mrs. Powell said her  
5 brother had been a competitive swimmer growing up, and  
6 snorkeled a number of times. And I think she said she and  
7 her husband had snorkeled at least a couple of times in  
8 Mexico. And there may have been another time as well.

9 Q. So they had substantial experience?

10 A. Let's just say they were experienced snorkelers.  
11 Certainly nothing that would suggest that they shouldn't  
12 have been snorkeling in Hanauma Bay.

13 Q. Her brother was Mr. Laughlin, right?

14 A. That's correct.

15 Q. And when she said her brother had been a  
16 competitive swimmer, what did you take that to mean?

17 A. I took that mean that he was a good swimmer.  
18 Somebody that was comfortable and used to being in the  
19 water.

20 Q. With respect to the lifeguards in the use of the  
21 scanning technique for looking at the ocean, how does that  
22 work? Can you explain the scanning technique to me?

23 A. As I understand the general strategy for  
24 lifeguarding is you should attempt to scan the entire area  
25 that you are responsible for in a ten second interval is  
00125

1 the goal to try to achieve. What you are looking for  
2 ideally are signs of a person before they get into a life  
3 and death situation. You are looking for somebody that's  
4 showing signs of being tired or anxious or nervous or  
5 potentially at risk. I read various things about what you  
6 look for in terms of the motion of the head and the body.  
7 And now you are starting to get beyond the  
8 expertise in risk management and getting into water  
9 safety, which would be more Mr. Ebro's area. There are  
10 certain cues that lifeguards are trained to look for.

11 Q. The 10/30 that you referred to today and in your  
12 report, where did that come from?

13 A. It's just general knowledge I had from work that  
14 I've done in the past. I don't know specifically if that  
15 was included in the phone conference with Mr. Ebro, for  
16 example, or if it was also included within the  
17 depositions. But that's just a general understanding of  
18 what I have of lifeguarding that's a general rule of  
19 thumb.

20 Q. Do you know if that's for oceans or pools?

21 A. It's for humans. Humans have the same drowning  
22 risks and phenomenon whether it's in fresh water, salt  
23 water, rivers, lakes, oceans.

24 Q. Do you think lifeguarding in a pool is the same  
25 as lifeguarding in the ocean?

00126  
1 A. No. Lifeguarding tasks may be different, but the  
2 symptoms and signs and survival of a person is still going  
3 to be the same.

4 Q. But would you apply the same standards for both  
5 scanning and for rescue efforts in a pool as you would in  
6 the ocean?

7 A. If you are talking about water safety and  
8 lifeguarding, Mr. Ebro is the one you should be discussing  
9 this with.



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10 Q. With respect to your 10/30 rule, you don't know  
11 exactly where that comes from, and you don't know what  
12 it's intended to apply to in terms of lifeguarding; is  
13 that correct.

14 A. No. I don't think that's an accurate  
15 representation of what we just talked about in the last  
16 few moments.

17 Q. Is that Mr. Ebro's area of testimony?

18 A. That is correct.

19 Q. So if it's Mr. Ebro's area of testimony, wouldn't  
20 it be best to look at what he has to say about the 10/30  
21 rule as opposed to what you have to say?

22 A. If you are looking about specific details of  
23 scanning strategies, lifeguarding issues and water safety  
24 issues, Mr. Ebro is the person to turn to.

25 Q. The 10/30 rule, you don't know where it came

00127  
1 from. You think it's general knowledge you have. But you  
2 can't point me to a specific source in connection with  
3 this case. You never looked at any source material,  
4 research material to verify that information?

5 A. I did not look anything up, that is correct.  
6 what I'm telling you is, as I think most people can  
7 appreciate, if you have a piece of knowledge you can't say  
8 necessarily it exclusively came from this source or this  
9 source if it's knowledge that you had.

10 I believe I read, I think it might have been Mr.  
11 Goodwin in his deposition said that their goal is to be at  
12 a person's side that needs aid within 30 seconds. That  
13 would be consistent with my general understanding of 10  
14 second, 30 second rule.

15 where all the possible sources are that I've  
16 arrived at that knowledge I can't tell you. I would defer  
17 to Mr. Ebro in that area. The point to be made is you got  
18 effectively one and a half lifeguards and 2,000 people  
19 snorkeling, you're not going to come anywhere close to  
20 achieving those types of goals.

21 Q. So you would defer to Mr. Ebro on the exact time  
22 period; is that correct?

23 A. That is correct.

24 Q. If Mr. Ebro were to testify he never heard of the  
25 10/30 rule, would that surprise you?

00128  
1 A. I have no opinion on what Mr. Ebro knows or  
2 doesn't know. He may have it under a different name.

3 Q. Is it a name or a standard?

4 A. I never represented it as a standard.

5 Q. This is a concept, whether it's 10 seconds,  
6 30 seconds, 10 minutes, 30 minutes, you can't say, right?

7 A. No, sir. I can tell you with confidence that a  
8 lifeguard should not scan the area once every 10 minutes,  
9 and he should not respond within 30 minutes.

10 Q. I think I can safely agree with you on that  
11 point. In terms of it being a 10/30 rule, it's really not  
12 a rule because we don't know those are exact numbers, and  
13 we don't know if it applies in the ocean. You can't show  
14 me where the source material is for that? You can't point  
15 me to it that it's verified that it's accurate?

16 A. That's a compound question. If you'd like to  
17 separate it out a piece at a time I'd be happy to address  
18 each of the pieces with you.

19 Q. I will. You can't tell me the source of the  
20 10/30 rule, can you?

21 A. No, sir. I believe that's not an accurate  
22 representation of what we testified to earlier. For  
23 example, I told you that I thought the 30 second aspect of  
24 the rule was iterated in one of the water safety officer's  
25 deposition. I believe it was Mr. Goodwin's. So to say I

00129  
1 can't tell you that is not an accurate representation of

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2 what I've been saying.

3 Q. If Mr. Goodwin uses 30 seconds, if someone  
4 remains motionless 30 seconds, just because he uses that  
5 30 seconds coincidentally doesn't necessarily mean he's  
6 referring to a 10/30 standard or rule?

7 A. Again, I haven't called it a standard.

8 Q. You called it a rule?

9 A. I didn't say rule as in formalized rule. It's my  
10 understanding that the general goal in lifeguarding is you  
11 scan your area within a certain interval of time, and you  
12 be able to respond to a person in distress within a  
13 interval of time. And as best I can recall from all of my  
14 knowledge those general numbers are on the order of 10  
15 seconds and 30 seconds. Now, whether there is some  
16 formalized document that has it in it or it has some other  
17 name, again Mr. Ebro would be the one to turn to.

18 Q. With the exception of a lifeguard testimony, you  
19 can't point to me where the 10/30 concept comes from,  
20 where you derived it from; is that correct?

21 A. Other than from my prior involvement with other  
22 water safety people in other cases that we talked about.

23 Q. So, therefore, unless I go back to look there to  
24 see if you knew where you got it from then, there's no way  
25 for me to tell or a jury to tell or a judge to tell what

00130

1 application that 10/30 concept is intended to apply; is  
2 that correct?

3 A. That is correct.

4 Q. You haven't read Mr. Ebro's deposition; is that  
5 correct?

6 A. I still haven't.

7 Q. You also discuss a 50 to one ratio for the USLA;  
8 is that correct?

9 A. I recall the 50 to one ratio.

10 Q. As I understand it, you took that from testimony  
11 of some of the lifeguards?

12 A. I believe that was the source.

13 Q. Did you make any effort to confirm that 50 to one  
14 ratio?

15 A. No, sir, I didn't.

16 Q. Were you aware that Mr. Ebro disagreed with your  
17 ratio?

18 A. It's not my ratio.

19 Q. He disagrees with that ratio?

20 A. I don't know if he does or not.

21 Q. With respect to any ratio or concept of staffing  
22 based on attendance, would you defer to Mr. Ebro's  
23 judgment?

24 A. Yes, I would.

25 Q. You also talk in your report or opine in your

00131

1 report about various staffing solutions or potential  
2 solutions for staffing at Hanauma Bay; is that correct?

3 A. I do.

4 Q. You talk about using additional lifeguards, jet  
5 skis, where the WSO's should be stationed, the use of  
6 buoys?

7 A. General concepts, that is correct.

8 Q. Are you intending for those to be actual  
9 solutions to be presented to a jury as to how to make or  
10 implement a safety plan?

11 A. I would say that those are examples of the kinds  
12 of things that can be done to enhance safety. I have not  
13 been asked to, nor would I be qualified to design a  
14 comprehensive lifeguarding plan for such a facility. That  
15 would be somebody like Mr. Ebro that would be able to do  
16 that. Not me.

17 Q. Would you agree that with the terms of the  
18 staffing, it would have to be a reasonable number of  
19 lifeguards?

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20 A. Well, what do you mean by reasonable?

21 Q. Well, I'm not sure. Would you just agree with  
22 the concept you want to have a reasonable number?

23 A. I think you need to have a reasonable number to  
24 make it safe. I think you have to have a reasonable  
25 number in terms of allocation of resources. For example,

00132

1 the lifeguard saying it should be 50 to one, I can look at  
2 that and say okay, you have 5,000 people here on a busy  
3 day. Should you have a hundred lifeguards? That's  
4 probably not feasible. If you have 5,000 people there and  
5 you have effectively one and a half lifeguards, no, I  
6 don't think that's reasonable either.

7 What is the exact number? Again, now you are  
8 starting to get into an area that's outside my expertise  
9 that I don't have an opinion on. I can certainly tell you  
10 that one and a half functional lifeguards for several  
11 thousand people in a snorkeling situation based on the  
12 limitations of scan rate and human perception make it an  
13 impossible feat.

14 Q. If it's impossible, has it just been lucky then  
15 in the years leading up to 2002 that there was a few  
16 drownings at Hanauma Bay?

17 A. I think if you look at the number of people that  
18 have drown there relative to all the beaches, I wouldn't  
19 constitute it a few.

20 Q. If you exclude 2002?

21 A. Again, if you have seven on all 18 lifeguarded  
22 beaches and you have two in Hanauma Bay in a given year,  
23 that's disproportionately high.

24 Q. Did you attempt to undertake any analysis of  
25 drownings on Oahu and the causes of drownings on Oahu at

00133

1 the various beaches?

2 A. Nothing other than just the raw data that was  
3 provided to look at it in comparison.

4 Q. Did you perform any statistical analysis of that?

5 A. Nothing other than what we've discussed of  
6 looking at percentages and ratios.

7 Q. At Hanauma Bay would it be your opinion that  
8 warning signs without lifeguards would be safer because it  
9 would put people on notice that there are no lifeguards?

10 A. No, I would not testify to that.

11 Q. Can you explain why warning signs create a schema  
12 that the beach is safe?

13 A. Well, I think in part what it does is that it  
14 alerts you to the fact that if there are hazards  
15 associated with this vicinity, that efforts have been made  
16 to inform you, the beach goer, of them, and here's the  
17 sign putting up telling you what the hazard is.

18 Therefore, you discount the need to search out other  
19 hazards because you anticipate they would have been warned  
20 about it as well. So it lowers your subjective risk.

21 Q. If you saw wave action would that impact on  
22 schema?

23 A. What do you mean wave action?

24 Q. Waves breaking, waves smashing against the rocks.

25 A. If it's literally something up close and personal

00134

1 where you can see it, yes. Something a thousand feet  
2 away, at that distance you're not going to appreciate the  
3 size of the waves.

4 Q. Unless you have experience with waves?

5 A. Unless you are an experienced ocean type person,  
6 then you might begin to appreciate it.

7 Q. You call the presence of lifeguard towers a false  
8 sense of security; is that correct?

9 A. Correct.

10 Q. Why false?

11 A. Well, I think when one sees a lifeguard tower or

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12 towers and you have lifeguards in the area, that you have  
 13 this sense of security of well, if I get in distress, they  
 14 will notice me and they'll come to my rescue.  
 15 If you look at the numbers, what you find out is  
 16 there really is effectively one and a half lifeguards for  
 17 a beach of several thousand people. There's been ten to  
 18 12 drownings reported in the 2002 year. I think it's  
 19 pretty clear that the level of security that the  
 20 lifeguards offer is far different than what the typical  
 21 tourist is going to anticipate.  
 22 Q. Would you agree that in order for a lifeguard to  
 23 see distress in a swimmer, that the swimmer would have to  
 24 be in a position where they could actually also see the  
 25 lifeguard or the lifeguard tower?

00135

1 A. No, sir. If I got my back to a lifeguard I can't  
 2 see the tower, but the lifeguard can sure see me.  
 3 Q. How about if you are facing the lifeguard, you  
 4 are facing the beach, would you agree that you would have  
 5 to be in a position where you face the beach and see the  
 6 lifeguard tower so the lifeguard could see you?  
 7 A. That sounds like something I would agree with.  
 8 Q. If a swimmer went inside the Witch's Brew point  
 9 would a lifeguard be able to see them inside the point?  
 10 A. Depending where the lifeguard is stationed, they  
 11 might. From the lifeguard towers, I don't believe they  
 12 can.  
 13 Q. The rocks are in the way, correct?  
 14 A. Correct.  
 15 Q. How about if you were in the slot, would you be  
 16 able to see into Witch's Brew?  
 17 A. If you are literally in the slot you could see  
 18 into part of Witch's Brew, but not all of it.  
 19 Q. How about if you are on the inside of the slot,  
 20 could you see into Witch's Brew?  
 21 A. I think the answer to your question is point to a  
 22 place on Exhibit 3, and we can draw a line across the  
 23 point of Witch's Brew, and anything to the right of that  
 24 line as you are looking out would be occluded, and  
 25 anything to the left would not be.

00136

1 Q. You think it's that simple geometry?  
 2 A. The only thing that is occluded would be the rock  
 3 point that sticks out.  
 4 Q. Wouldn't it matter how high you were in the  
 5 water?  
 6 A. You're going to bob up and down. You're not  
 7 going to be in sight 100 percent of the time. The  
 8 question was would it be within sight, the answer is yes.  
 9 There's not enough curvature of the earth over that  
 10 distance to cause any occlusion.  
 11 Q. You didn't go out there to the slot to try and  
 12 take a visual perception of Witch's Brew, did you?  
 13 A. No, I did not.  
 14 Q. You've never done that?  
 15 A. I have not.  
 16 Q. What were Mr. Powell and Mr. Laughlin wearing on  
 17 the date of the incident?  
 18 A. I believe bathing suits, face masks, fins and  
 19 snorkels.  
 20 Q. What color were the bathing suits?  
 21 A. I don't recall.  
 22 Q. Did you do any analysis of the visibility of  
 23 swimmers in the water?  
 24 A. Other than to say that you can certainly see them  
 25 from the lifeguard towers as they go out the slot. You

00137

1 can certainly see them on the outer portion of the reef.  
 2 And you can certainly see them swimming towards Witch's  
 3 Brew or across from Toilet Bowl.

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4 Q. Does it matter what they're wearing?  
5 A. No, I don't think so.  
6 Q. If you could see someone swimming in the outer  
7 reef area or snorkeling without any apparent distress,  
8 would you believe that as a lifeguard you had an  
9 obligation to go out there and rescue them?  
10 A. In general or on the facts of this case?  
11 Q. In general.  
12 A. In general it would depend on whether or not the  
13 area was closed and whether or not the lifeguards had  
14 reason to believe the area was unsafe to be in. If it was  
15 such as on the facts of this case, then absolutely they  
16 had a reason to go out there. You close the area for the  
17 tourists, not for the lifeguards. If the tourists are in  
18 an area that's closed, they need to be informed of that.  
19 Q. In your report, Exhibit 1, page 9, you indicate  
20 that Moses testified he saw a swimmer, we're not sure who  
21 it is, swim around Witch's Brew point, yet he took no  
22 action to intervene. Do you recall that Mr. Moses took no  
23 action to intervene until he saw that swimmer attempt to  
24 climb up on the rocks?  
25 A. That's correct.

00138  
1 Q. So he actually saw him coming in a continuous  
2 fashion, saw that swimmer, once he saw him and saw him  
3 trying to come out on the rocks, correct?  
4 A. No, sir. I don't recall him saying that in his  
5 deposition.  
6 Q. What do you recall in terms of the sequencing?  
7 A. What I recall was he said nothing about observing  
8 a swimmer in a continuous fashion from the beginning until  
9 he was up against the rocks. He talked about two  
10 different points in time. That he saw a swimmer out  
11 there. And ultimately he saw the swimmer in distress.  
12 And that's when he sent somebody else out.  
13 Q. What did you assume was the time lag between the  
14 time he saw the swimmer and the time he saw the swimmer in  
15 distress?  
16 A. I made no assumptions. I don't believe that was  
17 specified in his deposition.  
18 Q. Isn't that an important issue?  
19 A. It would be nice to have that data. But if you  
20 don't have the data there's nothing you can do.  
21 Q. Assume that Mr. Moses will testify that he  
22 observed someone swimming around the point and then  
23 shortly thereafter observed that person trying to climb  
24 out. Does that affect your opinion with respect to the  
25 attentiveness of the lifeguards?

00139  
1 A. If I take your entire question, yes, it does.  
2 Q. How does it affect?  
3 A. The first thing it affects is you have to tell me  
4 whether or not the area is closed. The second thing you  
5 have to tell me is whether or not you accept the testimony  
6 that's done by Major Maceo, who says they're not supposed  
7 to monitor that area out there. The third thing you have  
8 to tell me is what do you mean by shortly thereafter. A  
9 tenth of a second, five seconds, 30 seconds, five minutes.  
10 Q. Let me ask you a question and follow-up to your  
11 questions to me.  
12 A. There's lots of incompletes there.  
13 Q. You raised some questions. With respect to Major  
14 Maceo, when he says that area is not supposed to be  
15 guarded, what area do you understand he's referring to?  
16 A. My understanding of what he's referring to is any  
17 of the area in the vicinity to and on the approach to  
18 Witch's Brew is not an area that's supposed to be  
19 monitored by the lifeguards. If you are not supposed to  
20 be monitoring something way out here, why is it that  
21 you're observing somebody swimming around the point.

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22 Q. So it's your understanding that Major Maceo's  
23 opinions with regard to Witch's Brew include not just the  
24 Witch's Brew area that we've identified, but also the area  
25 around Witch's Brew point and the area leading out to

00140

1 witch's Brew point; is that correct?

2 A. As I've just indicated and as you've just  
3 indicated pointing at points on the map, yes, sir. That  
4 doesn't mean if I move way in closer to the reef you're  
5 not supposed to monitor that area. But the testimony, as  
6 I understand Major Maceo, is that if he had seen men  
7 swimming, such as Mr. Powell and Mr. Laughlin, he wouldn't  
8 have perceived them as being at risk. I strongly disagree  
9 with that.

10 Q. Why do you perceive them as being at risk?

11 A. They're in an area hundreds of feet beyond the  
12 area that's closed. An area that they should never have  
13 been in. They're clearly in an area that the lifeguards  
14 have identified as dangerous and closed. And the only way  
15 to get out there is to swim through a long distance of an  
16 area that's dangerous and close. Of course you have to do  
17 something to respond to that.

18 (Mr. Kodish enters deposition proceedings.)

19 Q. The area that's closed according to your  
20 understanding is the area beyond Witch's Brew point,  
21 correct?

22 A. That's not the only area that's closed.

23 Q. What other area is closed?

24 A. My understanding is the outer reef. When you  
25 come through the slot, the slot on the outer reef is

00141

1 closed.

2 Q. It's critical to your testimony, in fact, all of  
3 your opinions turn on the fact that area is closed?

4 A. No. I would not make that broad and over-  
5 sweeping of a statement.

6 Q. If the areas are not closed, let's assume they're  
7 not closed as of that time, if a swimmer was swimming out  
8 towards Witch's Brew point, would it be acceptable for a  
9 lifeguard to observe them swimming, observe they're not in  
10 distress, and not take any action to intervene, wouldn't  
11 it?

12 A. No. You are getting into a vicinity of an area  
13 that's dangerous. How close do you let somebody get to  
14 the fire before you finally pull them out?

15 Q. It depends on how hot the fire is.

16 A. If it's hot enough to close Witch's Brew, it's  
17 pretty hot.

18 Q. We don't know under what standards they close  
19 Witch's Brew, do we?

20 A. No. The issue is every single one of the water  
21 safety officers said this area was closed. So it's not a  
22 matter of dispute, at least in my opinion. I've accepted  
23 that as fact that it was dangerous and that's why they  
24 closed it.

25 Q. At what point does a WSO have an obligation to

00142

1 intervene with a swimmer who is not in distress as they  
2 approach an area that's closed?

3 A. That's such a broad question I couldn't begin to  
4 answer it.

5 Q. Under the facts of this case, making the  
6 assumption that Zone 2 is not closed.

7 A. That's inconsistent with the facts of the case.  
8 So you can't ask me that question.

9 Q. Sure I can. You've been an expert witness for  
10 thousands of cases, and you've dealt with hypotheticals  
11 before, haven't you?

12 A. That's not the facts of the case then. It's a  
13 hypothetical.

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14 Q. I've asked you to make an assumption. You  
15 understand that, right? You understand the concept of  
16 hypothetical questions. I've watched you answer thousands  
17 of them, it seems like, from my colleague, Mr. Louie.  
18 I'm going to follow-up on this. Hypothetically,  
19 using the assumption that Zone 2 is not closed, assuming  
20 that Witch's Brew is closed, how far from Witch's Brew  
21 point should a lifeguard intervene when two swimmers are  
22 swimming towards Witch's Brew point and in no apparent  
23 distress?

24 MS. WATERS: Objection. Lacks foundation.

25 THE WITNESS: I can't give you a quantitative

00143

1 answer. But I would tell you from my experience and  
2 knowledge of what's in the area, the desired areas to  
3 snorkel are in close to this line as we referred to as  
4 being the outer reef. If you see somebody there  
5 snorkeling and they started leaving an area where there's  
6 quality snorkeling, they're headed towards an area that's  
7 dangerous, certainly you need to start attending them and  
8 observing them to determine is there intended path taking  
9 them to a zone of danger. You have to be able to  
10 intercede and intercept before they get to the point of  
11 danger.

12 BY MR. REINKE:

13 Q. Do you know whether or not there's any good  
14 snorkeling from Witch's Brew point all the way along the  
15 line to the beach?

16 A. If it's a calm day and you don't have rough  
17 swells breaking and tearing up the water and making it  
18 dangerous, there may be some along the shore. But that  
19 means the way you would get there is to come across and  
20 over if you are going to stay in good snorkeling. If I  
21 accept your hypothetical that Witch's Brew was closed,  
22 then likely you're going to have some heavy surf along the  
23 edge where the green line is. If you see somebody coming  
24 in that direction you would need to intercede before they  
25 would arrive at the zone of danger.

00144

1 Q. You'd be able to see it, correct?

2 A. If you directed your visual attention to that  
3 with the purposes of making that determination you would  
4 do that.

5 Q. So if an individual decided that they want to go  
6 over to that ledge to snorkel because they want to see  
7 what it was like, they would have the opportunity to see  
8 white water against that ledge, correct?

9 A. The opportunity. That didn't mean that they  
10 will. We talked about this earlier. If you are face down  
11 snorkeling, you are following a turtle, you're not going  
12 to have the physical opportunity to make those  
13 observations.

14 Q. If you are face down in the water and you're  
15 snorkeling along and you are following that turtle, moving  
16 towards the ledge, you may or may not know you are coming  
17 close to the ledge because your face is down. Is the  
18 water activity, based on your experience as a snorkeler,  
19 going to change or be different as you get closer to the  
20 ledge?

21 A. It depends on the direction the swells are coming  
22 and how big they are. Sometimes they will, sometimes they  
23 don't.

24 Q. On the day in question, given everything you know  
25 about that day, would you imagine that there would be

00145

1 enough water activity to put you on notice that you were  
2 coming close to a ledge?

3 A. I can't offer an opinion on that one way or  
4 another.

5 Q. In your rebuttal to Major Maceo's report, which



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6 we attached as Exhibit 2, you discuss the warning signs  
7 being grossly deficient. Can you just explain to me what  
8 it is about the warning signs that is grossly deficient?  
9 A. I'd say the simplest and most important point is  
10 that the warning signs have nothing to do with the hazards  
11 at hand. They don't tell you an area is closed and it's  
12 unsafe to enter. They only tell you there's a current.  
13 The current appears, as the signs suggest to indicate, are  
14 parallel to the beach.  
15 Q. In your original report you never mention any  
16 problem or deficiency with the signs; is that correct?  
17 A. The original report is 10 or 12 pages long. I  
18 don't know if I say anything about the signs or not.  
19 Q. You read that report last night getting ready for  
20 this deposition, didn't you?  
21 A. I read lots of things. I can't tell you the  
22 sources of my knowledge. I can tell you what I know.  
23 Q. Last night you read that report, didn't you?  
24 A. I did, yes, sir.  
25 Q. Just like I did.

00146

1 A. I don't know if you did.  
2 Q. I did.  
3 So within 24 hours of your reading it, in the  
4 original report did you mention deficiencies in the  
5 warning signs?  
6 A. I can tell you the same answer I just told you.  
7 I don't remember if I did or not. If you can point me to  
8 the page, that would be great. If not, I'll take time and  
9 skim through it.  
10 Q. Take time to skim through it.  
11 (Mr. Kodish leaves deposition proceedings.)  
12 Q. I appreciate you going through the report just  
13 then. My question was bad. I want to restate my  
14 question.  
15 In your first report you didn't mention any  
16 deficiencies based on ANSI, compliance with ANSI; is that  
17 correct?  
18 A. I don't think I used the phrase ANSI in the first  
19 report, having just skimmed through things. I wasn't  
20 looking for ANSI. I was looking for warnings.  
21 Q. In the second report you say, that is the  
22 rebuttal report, you say the ANSI signs are grossly  
23 deficient?  
24 A. No. The ANSI signs aren't grossly deficient.  
25 The subject signs are grossly deficient.

00147

1 Q. Page 4, Exhibit 2, opinion number five, you say  
2 under A, but these warnings were grossly defective; they  
3 were not consistent with requirements as set forth by the  
4 American National Standards Institute (i.e. ANSI Z 535.1  
5 through Z 535.5. Did I read that correctly?  
6 A. You did.  
7 Q. In your first report you don't make any reference  
8 to ANSI that I saw. And you just skimmed through it. You  
9 didn't see any reference to ANSI when you skimmed through  
10 it looking for warning sign issues, correct?  
11 A. I don't recall having seen any, no.  
12 Q. Did something change between the time you did  
13 your original report and the time you did your rebuttal  
14 report with respect to the ANSI standards?  
15 A. No.  
16 Q. Is there a reason in your original report you did  
17 not reference any inconsistency with the requirements of  
18 ANSI?  
19 A. I didn't reference them specifically because I  
20 thought that the warning signs were not the primary issue  
21 here in terms of ANSI compliance or non-compliance. But  
22 when Major Maceo offered his report, I thought it was  
23 important to at least note that the signs that he was

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24 claiming were there, that people should at least know were  
25 grossly defective, one, and two, were not consistent with

00148

1 ANSI.

2 Q. Those are two separate criticisms?

3 A. Well, they are two sentences. It's a sentence  
4 and a semicolon and a sentence.

5 Q. I thought the semicolon was explaining what you  
6 meant by the first sentence.

7 A. No.

8 Q. First off, how are they grossly defective?

9 A. Grossly defective is that Witch's Brew area is  
10 closed. Zone 2 is closed. The signs just simply tell you  
11 strong current. They have nothing to do with what the  
12 hazard is. That's the grossly defective part.

13 Q. The hazard is Witch's Brew?

14 A. The hazard is Witch's Brew and the outer area,  
15 Zone 2, being closed. You should not be in that area.  
16 It's off limits. It's unsafe. There's no sign to give  
17 you any of that information.

18 Q. Is that based on what you mean by grossly  
19 defective because there's no signage?

20 A. Correct. You don't have any signage for the  
21 hazard.

22 Q. The second part of that sentence is the  
23 inconsistency with the requirements of ANSI. Can you  
24 explain that?

25 A. In order to be thorough I'd have to look at a

00149

1 color photo of the signs, if you have one handy.

2 Q. You know, oddly enough I do. Let's go ahead and  
3 mark this as Exhibit 5. Three color photocopies of signs  
4 at Hanauma Bay. We'll mark those as 5.  
5 (Exhibit 5 was marked for identification.)

6 A. I don't suppose you have one that's big enough I  
7 can read.

8 Q. Actually I do. If you would look at the  
9 Exhibit 4, they're not color, but they are the diagrams.

10 A. Well, what I would say is the primary thing,  
11 without having the standards in front of me to read, is  
12 that you're supposed to have a single word panel, which it  
13 does. You are supposed to have a separate message word  
14 panel which it does, but it's not separated as it's  
15 supposed to be. You are allowed to have a pictogram. I'm  
16 not certain you are allowed to have the pictogram in the  
17 middle. I know you are allowed to have them on the side.  
18 The size of the lettering is not consistent with the  
19 height lettering that it's supposed to be. Those are some  
20 of the things that strike me off the top of my head.

21 Q. When you wrote your rebuttal report you didn't  
22 have the standards in front of you either, did you?

23 A. No. I didn't pull them out for purposes of that.  
24 I just looked at the sign and knew it didn't comply with  
25 ANSI. The key issue with the sign is the fact that you

00150

1 don't have a sign relevant to the hazard.

2 Q. Anything else with respect to ANSI in these  
3 signs?

4 A. No. Again, I don't think that's -- The reason I  
5 brought it out is the testimony that was offered by your  
6 expert. And I just thought it was worth noting that it  
7 doesn't comply. The main point on the warnings is you  
8 don't have one.

9 Q. With respect to the ANSI standards, are you aware  
10 of whether or not the Act 190 task force considered the  
11 ANSI requirements in coming up with approved signs?

12 A. Again, I can't speak to the phrase Act 190. I  
13 can speak to the phrase governor's task force. And my  
14 review of the work that the governor's task force was that  
15 they did consider ANSI. And they, the committee, made a

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16 decision to not comply fully with ANSI is what I recall  
17 having read.

18 Q. And so in terms of the state of Hawaii for  
19 whether signs are acceptable or not, the ANSI standard has  
20 not been adopted, is that correct, with respect to these  
21 beach warning signs?

22 A. They did not fully adopt it, that is correct.

23 Q. So your criticism of them is not consistent with  
24 Hawaii law, which allows for these types of signs,  
25 correct?

00151

1 A. No, sir, that's not true. First of all, I'm not  
2 hear to offer testimony about legal things, whether it's  
3 safe or unsafe, as my testimony. Secondly, no law says  
4 nothing about the fact that you can post a sign about  
5 shore breaks and current and that excuses you for not  
6 warning the area is closed and don't go into it. That's  
7 really the heart again of my testimony. It's not whether  
8 the sign is the right size, shape, color, or lettering.  
9 It's that an area is closed, it's dangerous, and you don't  
10 have a sign for that.

11 Q. If the area is intermittently open and closed,  
12 you wouldn't have a permanent sign, would you?

13 A. I'm not proposing a permanent sign, no, sir. I'm  
14 proposing what you do, for example, on the North Shore.  
15 You don't permanently put signs up that say high surf,  
16 beach closed. You evaluate it. When it is you put up a  
17 temporary sign.

18 Q. The closure of the beach is not a natural  
19 condition, it's a manmade condition, whether you close it  
20 or open it?

21 A. Nature doesn't close the beach. Nature creates  
22 conditions that causes man to decide it's dangerous and  
23 therefore man takes action to close beach.

24 Q. Exactly. The hazard is man created it in this  
25 instance because under your definition until the beach is

00152

1 closed there's no hazard, correct?

2 A. No, no. The hazard is not manmade. The hazard  
3 is nature made. Man has the ability to control that  
4 hazard by closing the beach or closing access to the  
5 hazardous area.

6 Q. You're not in a position, you form no opinion  
7 about what the natural condition was that created this  
8 hazard?

9 A. No, sir. I think that's a misrepresentation of  
10 what we talked about before. I gave you my general  
11 understanding of the physical conditions that create the  
12 hazards. But that the heart of my testimony was I  
13 accepted the sworn testimony of all the water safety  
14 officers that the area was dangerous and closed.

15 Q. What are the natural conditions that you  
16 considered to have created the hazardous condition out  
17 there?

18 A. The conditions that create the hazard are a  
19 combination of things. The waves, the current, the  
20 swells, the choppy water, the rock bluffs, the distance  
21 that you are from the lifeguard. There's a number of  
22 things that coalesce together.

23 Q. Distance from lifeguards isn't a natural  
24 condition, is it?

25 A. Well, the physical space is a natural condition,

00153

1 yes.

2 Q. It's an apparent condition, it's obvious, isn't  
3 it?

4 A. Again, we had that discussion. If you ask  
5 somebody to stop and look where you are relative to the  
6 shore, you can arrive at an estimate of that. But I don't  
7 think that's something that's in the conscious mind of a

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8 snorkeler in Hanauma Bay when they have land on both sides  
9 of them. From a safety perspective the question you are  
10 asking is not a question that is relevant to a safety  
11 analysis.

12 Q. I'm looking at the natural conditions that form  
13 the hazard. The condition where the lifeguard tower is  
14 and where Witch's Brew is a constant, isn't it?

15 A. That's correct.

16 Q. So it's not a natural condition, is it?

17 A. It's most definitely a natural condition.  
18 Witch's Brew point was not manmade. The beach was not  
19 manmade. The spacing between there is not manmade.  
20 That's a physical condition. It's a natural condition  
21 that existed and we built a path down there and said let's  
22 come down and swim and snorkel.

23 Q. What's the difference between waves and swell and  
24 choppy water?

25 A. First I would tell you I would defer to an expert

00154  
1 in oceanography. In general I think of swells as being  
2 non-surface breaking, not white water that propagated over  
3 long distances. I think waves of being more wind  
4 generated, oftentimes resulting in white water on surface.  
5 White caps they're often referred to. That would be my  
6 use of the terminology.

7 Q. What's choppy water?

8 A. Choppy water is where you see white water. Water  
9 varying in elevation.

10 Q. Same as waves?

11 A. No. I think of a wave as being more propagating  
12 in a linear fashion. Where choppy can be more of a  
13 washing machine effect. Water is undulating, changing in  
14 elevation, but not in a linear fashion such as waves or  
15 swells.

16 Q. One of the suggestions you have is you put buoys  
17 to mark dangerous areas and restrict or warn swimmers. Do  
18 you recall that?

19 A. I think that's something the water safety  
20 officers talk about.

21 Q. Do you know if Mr. Ebro talked about that?

22 A. No.

23 Q. Do you know if buoys create a natural attraction  
24 for people to want to swim to?

25 A. That would not surprise me as a potential.

00155  
1 Q. So if you have a buoy out by Witch's Brew do you  
2 think it might attract people to swim out there?

3 A. It depends on the nature of the buoy. If you  
4 design it big enough with a warning symbol on it as  
5 opposed to something as being an attraction, then no, I  
6 don't think it would.

7 Q. Is a person responsible for knowing their own  
8 physical limitations?

9 MS. WATERS: Objection. Overbroad.

10 THE WITNESS: To the extent that we are capable  
11 of that, yes. Obviously we are limited in our ability to  
12 perceive things.

13 BY MR. REINKE:

14 Q. By the way, do you know what the limits of the  
15 lifeguard's jurisdiction are at Hanauma Bay, where they  
16 stop having guarded areas and not guarded areas? Is it  
17 outside the bay, do you know?

18 A. I do not.

19 Q. Do you know if lifeguards do have any  
20 limitations?

21 A. I don't know. All I would say is if there's a  
22 limited range to which they are supposed to have  
23 authority, control, and observations over that, that  
24 should be communicated to the visiting public.

25 MR. REINKE: Off the record.

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00156

1 (Recess taken.)

2 (Mr. Mayeshiro enters deposition proceedings.)

3 MR. REINKE: Back on the record.

4 Q. Dr. Gill, I want to make sure I ask this question  
5 so that I don't get in trouble later on. But with respect  
6 to your opinions in this case, are all of the opinions you  
7 plan on offering at trial contained in your report and  
8 rebuttal report?

9 A. Based on the discovery material available to  
10 date, yes, sir, they are.

11 Q. Would you tell me, if you can, generally what  
12 your opinions are with respect to the accident in this  
13 case?

14 A. Can you be more specific in what you are looking  
15 for?

16 Q. I would like to get your summary of what you  
17 believe you are going to opine about at trial in this  
18 case.

19 A. I would simply say the short answer to that is if  
20 you follow the major heading outlines that are on Exhibit  
21 No. 1 of my report, that would be the general outline of  
22 my anticipated testimony.

23 Q. So with respect to this report then, there's  
24 nothing you anticipate testifying about that I would find  
25 outside of this report?

00157

1 A. No. Because then I would also anticipate  
2 testifying about what's in report number two, or  
3 Exhibit 2.

4 Q. Anything else?

5 A. Based on the discovery that's available to date,  
6 no, sir, that would be it. I don't believe in playing  
7 hide the ball. I tried to tell you everything that I have  
8 an opinion on in those two reports.

9 Q. Did you make any effort to determine how long it  
10 would take to get from the lifeguard tower where WSO Moses  
11 was located and Witch's Brew, how long it would take to  
12 get there?

13 A. I didn't attempt to do that by either land or  
14 water.

15 Q. Do you have any information about how long it  
16 would take?

17 A. Well, I can certainly go through and make  
18 estimates. I haven't attempted to do that.

19 Q. Is it not important to your opinions?

20 A. No, no. What's important to my opinions is as  
21 the experts and professionals there, that they do what's  
22 necessary to intercept people before they reach that zone  
23 of danger.

24 Q. We haven't agreed upon where they should begin  
25 their interception, have we?

00158

1 A. No. You had asked me that question and we got  
2 started down that path. And I said at a minimum you have  
3 to intercept before they get to the dangerous point.  
4 Beyond that, again if the area is closed, and somebody is  
5 deliberately swimming away from the snorkeling area  
6 towards the dangerous area, that alerts the lifeguard to  
7 the need to be more vigilant in watching them so that they  
8 can make that interception with a margin of safety.

9 Q. Are you able with this red pen to mark for me  
10 where you believe the last time under the conditions that  
11 day a person should have been intercepted before they  
12 reached Witch's Brew?

13 A. No, I couldn't do that.

14 Q. The reason you can't do that is because?

15 A. There's too many unknown parameters.

16 Q. And you don't know how long it would take for  
17 someone to snorkel from the slot or the general area of

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18 the slot to Witch's Brew; is that correct?

19 A. No. Again, you could put boundaries on it if you  
20 want to estimate the distance in swimming speeds and  
21 assume somebody went in a deliberate straight line path,  
22 you could certainly put boundaries on it. But I haven't  
23 attempted to do that.

24 Q. Do you have any understanding of how long Mr.  
25 Powell and Mr. Laughlin had been snorkeling prior to the

00159  
1 drowning?

2 A. I think the general estimates, as I understand  
3 all the discovery we have, it's on the order of an hour to  
4 hour and a half. Mrs. Powell talked about the fact that  
5 they had been out for about that long. And she started  
6 getting a little anxious. And then there's discussions  
7 about what time they came back in from the first one and  
8 then they ate lunch and went back out. An estimate of  
9 that point of time versus the time when the bodies were  
10 recovered seem to be in that general range, an hour to  
11 hour and a half.

12 Q. In an hour you could go from end to end of the  
13 bay snorkeling?

14 A. Depending on the rate you snorkel you could.

15 Q. You could stay inside the inner reef in an hour?

16 A. Correct.

17 Q. Would it be fair to say based upon the distances  
18 that I've estimated, about 300 yards to Witch's Brew, that  
19 you could make it from the slot to Witch's Brew in less  
20 than five minutes snorkeling?

21 A. Boy, snorkeling, no. Swimming and swimming  
22 deliberately, maybe. But that's a long distance to  
23 snorkel in five minutes. That's a long distance to swim  
24 in five minutes.

25 Q. For a good competitive swimmer?

00160  
1 A. They're not out there swimming races for speed.

2 They're out there snorkeling. Most people that snorkel  
3 don't bring their arms up over their shoulder and swim in  
4 a crawl like fashion. Their arms are at their side. And  
5 they're casually using their flippers to maneuver. I very  
6 rarely see a snorkel swim with a freestyle swim stroke.

7 Q. We don't know and nobody is ever going to know  
8 what Mr. Laughlin and Mr. Powell were out there doing?

9 A. I don't have any evidence to answer that  
10 question.

11 Q. Lifeguards don't continuously observe someone, do  
12 they?

13 A. Well, it depends on the nature of what's going  
14 on. In general, no. They have to continually switch  
15 their gaze to pick up any potential foreseeable hazards.  
16 But if you see somebody that is thrashing about or looks  
17 like they may be at risk, then yes, you do stay focused on  
18 them until you identify one of two things, they're not at  
19 risk or they need your immediate attention.

20 Q. How do you make the determination they're not at  
21 risk?

22 A. Now you are starting to get into areas that I  
23 recommend you talk to Mr. Ebro. I read various signs of  
24 what you look for that shows the pre-drowning phase when a  
25 person is at risk. I just don't recall what all those

00161  
1 are.

2 Q. Would you turn to page 4, paragraph six.

3 A. Report one or report two?

4 Q. Report one. I apologize. Exhibit 1.

5 A. Page 4?

6 Q. Paragraph six.

7 A. Okay.

8 Q. You note that the city and county was on notice  
9 of hazardous conditions that were not being effectively

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10 mitigated.

11 In the context of that paragraph what do you mean  
12 by hazardous conditions?

13 A. The overall potential hazards associated with  
14 drownings at Hanauma Bay.

15 Q. Can you be more specific than that?

16 A. No. You would have to have detailed reports of  
17 each of the drownings and go into an analysis to determine  
18 what the contributing factors were in each individual one.

19 Q. Suppose someone did review those and determine  
20 that in the cases of each of those drownings they were  
21 caused by conditions that couldn't have been prevented?

22 A. I guess that's possible. I'd be hard pressed to  
23 believe that given the facts that we know. One and a half  
24 lifeguards with several thousand people snorkeling that  
25 are known to be mostly tourists that are not familiar with

00162  
1 ocean hazards, I find it hard pressed to arrive at that  
2 conclusion.

3 Q. I guess I'm still confused. You are putting on  
4 notice of a hazardous condition. When you say we're on  
5 notice of that hazardous condition, what do you mean by  
6 hazardous condition in that context?

7 A. If you have 18 lifeguarded beaches in Oahu and in  
8 an entire 12 months you have seven drownings on 17 of  
9 those beaches, and in four months you have six drownings  
10 on one beach, wouldn't that put you on notice that there's  
11 a potential hazard or hazards associated with this beach?  
12 It has such a huge rate of drownings relative to all the  
13 other beaches. I don't know what that factor or factors  
14 are. But the point of notice is you know there's  
15 something going on here that warrants immediate  
16 investigation and attention.

17 Q. My focus is on the hazardous conditions. Because  
18 you are making an assumption that the notice is being  
19 caused by some sort of condition at Hanauma Bay, correct?

20 A. No. The notice is that you had six or seven  
21 people drown in a matter of a few months. That's notice  
22 that there's an unsafe condition here.

23 Q. Is an unsafe condition necessarily a hazardous  
24 condition?

25 A. Yes. I believe a condition that leads to death  
00163

1 of six people is a hazardous condition.

2 Q. What is the condition?

3 A. Well, I don't know the answer to that because A,  
4 I didn't analyze it, and B, as I understand it, nor did  
5 Hanauma Bay.

6 Q. You didn't analyze what the hazardous condition  
7 was with respect to any of the other drownings; is that  
8 correct?

9 A. Not at the level of the detail I understand your  
10 question to be, no, sir.

11 Q. Well, do you analyze even where those drownings  
12 took place?

13 A. I don't recall that information being presented  
14 in discovery. I think I saw some data, a scatter map, if  
15 you will, of where some of the drownings were. I think  
16 there was testimony, I believe it was Mr. Bregman, that  
17 said ten of the 12 drownings in 2002 were within 75 yards  
18 of shore. I think that's the only information I can  
19 recall in answer to your question.

20 Q. Do you know prior to this incident that there had  
21 ever been a drowning at Witch's Brew?

22 A. I don't recall having read any evidence that  
23 there was. I'm not saying there wasn't. I don't recall.

24 Q. Because you don't recall anything, you are not  
25 aware of any evidence, you can't assume that there has

00164  
1 been, can you?



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2 A. No, I'm not assuming there was.  
3 Q. So with respect to the hazardous conditions at  
4 Hanauma Bay that were put on notice by the drowning, those  
5 must be different hazardous conditions that exist out at  
6 Witch's Brew?  
7 A. No, sir. There's no connection between those two  
8 at all.  
9 Q. There's no connection between the seven drownings  
10 on the inner reef and Witch's Brew?  
11 A. No, that is absolutely not true.  
12 Q. How is it not true?  
13 A. Just an example, one of the points that I keep  
14 driving home is if you got 2,000 people that are terrible  
15 swimmers in general that are mostly tourists that come  
16 there thinking they don't have to swim, they're snorkeling  
17 face down, and one and a half lifeguards, I think you can  
18 see that if you have drownings associated with that  
19 condition it doesn't matter whether it's in, excuse the  
20 analogy, aisle one that somebody slips and falls or aisle  
21 two. It's the same hazard.  
22 Q. Haven't we agreed that staffing is an aquatic  
23 issue?  
24 A. No, sir. You've agreed to that. I haven't.  
25 Q. Is your position as a safety person to determine

00165  
1 how many WSO's should be there?  
2 A. No, sir. There's a difference between those two  
3 extremes. I have no opinion and I can't tell you the  
4 number. I think we've talked about that multiple times.  
5 Q. Your opinion is there should be more; is that  
6 correct?  
7 A. Absolutely. To ask one and a half lifeguards to  
8 monitor over 2,000 people that have minimal swimming  
9 skills and minimal knowledge of the ocean face down  
10 snorkeling is an absurd thing to try to do.  
11 Q. That requires you to draw upon someone else's  
12 expertise as a lifeguard in terms of scanning techniques  
13 and what lifeguards do in order to give that opinion?  
14 A. No, sir, it does not.  
15 Q. Why not?  
16 A. Because I understand basic human factors and the  
17 rate people can scan visually, how long it takes to fixate  
18 on target. I understand the physical range of space that  
19 they're trying to monitor. I know that that's well beyond  
20 the capability of one and a half people to do that. You  
21 can't come anywhere close to doing that.  
22 Now, how many people do you need and where is the  
23 trade off point for allocation of resources and so forth,  
24 now you better bring in somebody that has water safety  
25 expertise as opposed to safety and risk management

00166  
1 expertise.  
2 From basic psychological perceptual principles  
3 and human factors principles, the concept of one and a  
4 half people being able to monitor this expanse with that  
5 many people under these conditions clearly can't be  
6 accomplished.  
7 Q. You keep using the phrase one and a half  
8 lifeguards. I know you don't necessarily mean there's a  
9 half person out there. What do you mean by one and a half  
10 lifeguards?  
11 A. Well, you have four staff lifeguards whose  
12 position description say 42 percent of their time they're  
13 to spend in the towers monitoring the water. So four  
14 times 42 percent is 1.6. So effectively averaged across  
15 the period of time that the bay is open on any given day  
16 you average 1.6 lifeguards that are monitoring the water.  
17 It's never any higher than four, but your average coverage  
18 rate is 1.6. So about one and a half people.  
19 Q. Where did the 42 percent come from?

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20 A. The position descriptions for the water safety  
21 officers that were provided in discovery.

22 Q. Is that in your file?

23 A. It is.

24 Q. Can you locate that for me?

25 A. I'll do the best I can.

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1 Q. I'm sure that if it's there you'll locate it.

2 A. Well, I know it's not in the deposition, if that  
3 helps.

4 Q. I know that too.

5 A. So it's in either the discovery documents here or  
6 here.

7 Q. Take just a moment, if you would.

8 A. I'm looking at Defendant's City and County of  
9 Honolulu's Response to Plaintiffs' First Request for  
10 Answers to Interrogatories to Defendant City and County of  
11 Honolulu, dated December 21, 2004.

12 One of those documents includes Department of  
13 Personnel, City and County of Honolulu, position  
14 description. Water Safety Officer 2. Item number one,  
15 man lifeguard tower and/or patrols beach on foot by ATV or  
16 rescue craft as assigned and keeps alert on all beach  
17 activities 42 percent. Then if you read the rest of their  
18 position descriptions, and I won't read all of them into  
19 the record, is supervise water safety officer 1, is  
20 12 percent, evaluate ocean conditions and perform  
21 preventive measures is 20 percent. 15 percent is  
22 maintains the ability to perform his duties in an  
23 efficient manner. Four percent, rescue people in  
24 distress. Four percent, ensure that supplies are  
25 maintained. Assist evacuating people, one percent.

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1 Operate vehicles, one percent. Perform other related  
2 duties, one percent.

3 Q. So you took that 42 percent figure and did an  
4 arithmetic calculation and said there's only 1.6 people  
5 watching the beach at any time?

6 A. On the average.

7 Q. In fact, on the day of the incident there's  
8 almost twice as much coverage, right? No. There's more  
9 than that. More than twice the coverage because we have  
10 multiple lifeguards there on duty watching the beach. Is  
11 that correct?

12 A. No, sir. I guess I must not be clear on that.  
13 If you have four people there. This is not what's really  
14 going on. But to illustrate my point. When you're there,  
15 40 percent of the time you are to be in the tower watching  
16 the ocean. And 60 percent of the time you are to be up in  
17 the parking lot collecting fees. I'm using that to  
18 illustrate the example. Only 40 percent of your time is  
19 spent monitoring the water to search for potential people  
20 in stress, for people that might be in distress, for  
21 people that might need rescue.  
22 So on the average at any given moment in time you  
23 have on the average 1.6 people watching the ocean to see  
24 if there's someone that's at risk. Because 58 percent of  
25 their time is dedicated towards things other than watching

00169

1 the water. That doesn't count restroom breaks, lunch  
2 breaks and so forth.

3 Q. I hear what you're saying. The four percent of  
4 performing rescues, that doesn't count either, does it?

5 A. If you are running along the shore with rescue  
6 equipment, or you are paddling with a board you are not  
7 watching the other people around you, or at least you  
8 shouldn't be.

9 Q. On those days when you are not performing rescues  
10 do you think that four percent migrates into watching?

11 A. No. I think what happens is if you are

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12 performing a rescue it takes more than four percent of  
13 your day. And so what these officials are saying is if  
14 you average it out over time, four percent of your time we  
15 expect you to be doing rescues. There were 285 rescues  
16 that year. That's almost one a day. When you figure that  
17 they're only open six days a week, that's really close to  
18 one a day. So yeah, I think four percent is probably a  
19 reasonable number. Now, you can quibble over the number  
20 all you want. Are you going to get much more than 1.6? I  
21 don't know.

22 Q. At the time of this incident there were two  
23 people scanning the water?

24 A. No. I believe there should have been four.

25 Q. That's higher than average?

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1 A. No, sir. Because we don't know for sure at that  
2 literal time of the incident, starting from when they  
3 leave the slot and go into the areas that they're not  
4 supposed to be, what all four lifeguards are doing.

5 Q. Were any of them performing rescues?

6 A. I don't know.

7 Q. So you're making an assumption based on a  
8 statistical analysis they were only spending 42 percent of  
9 their time during that time period?

10 A. I'm not making an assumption. I'm using physical  
11 data and the laws of statistics to do an analysis.

12 Q. Are the laws of statistics borne out by the facts  
13 of this case?

14 A. Yes, I believe they are. If you've only got on  
15 the average only 1.6 people, that explains how two  
16 individuals can swim so far into harm's way and not be  
17 detected.

18 Q. Is there any testimony that would suggest that at  
19 the time of the incident all of the lifeguards were not on  
20 duty?

21 A. No, I'm not saying they were. I don't know of  
22 any. I'm not making such claims.

23 Q. Is there any evidence that all of the lifeguards  
24 on duty were not monitoring the bay during the time period  
25 when Mr. Powell and Mr. Laughlin were on their second

00171

1 snorkel out that day?

2 A. The laws of statistics would argue against that,  
3 yes, sir.

4 Q. The laws of statistics aren't evidence in this  
5 case, are they?

6 A. The laws of statistics apply to the evidence that  
7 we have, that you have no relief lifeguards. That you  
8 have only four on duty lifeguards, and they are required  
9 by their position description to do various things. If  
10 you apply the laws of statistics to that evidence you  
11 would conclude on a more probable than not basis there was  
12 not four people monitoring the water for people in  
13 distress during that entire time frame.

14 Q. There's no evidence that you are aware of that's  
15 been presented in this case by way of testimony that all  
16 of the lifeguards on duty were not monitoring the water;  
17 is that correct?

18 A. No, sir, I would disagree.

19 Q. Would you point the testimony out to me that you  
20 are aware of that suggests that all of the lifeguards on  
21 duty were not monitoring the water at the time of the  
22 second Powell, Laughlin snorkeling outing?

23 A. I understood your first question to use the word  
24 evidence, not testimony.

25 Q. Okay. Let's limit it to testimony. Is there any

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1 testimony in that regard?

2 A. There's no testimony one way or another that one  
3 can draw on that. I don't recall any of the lifeguards

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4 being asked what you were doing second by second with your  
5 time.

6 Q. Is that an important question?

7 A. No, I don't think it is. Because I don't think  
8 someone can answer that.

9 Q. Why wouldn't they be able to answer that?

10 A. Describe for me what you've done the last hour of  
11 your time second by second, which chair you were in, where  
12 your arms were, were you in this room, how long you were  
13 out of this room. You can't begin to do that.

14 Q. Okay. Is that different second by second by  
15 saying I've been watching the beach, I've been watching  
16 the lifeguards, I've been watching the water, I've been on  
17 duty?

18 A. Yes, I think it's different than that. But still  
19 the point to be made is I don't think that you can ask  
20 someone a year or more after an event what did you do for  
21 an hour before a catastrophic event occurred. I don't  
22 think somebody can tell you with that level of accuracy.

23 Q. Did you do any analysis or study at Hanauma Bay  
24 to verify your statistical conclusion regarding 1.6, did  
25 you do that?

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1 A. No. I don't believe that was necessary.

2 Q. Did you have an opportunity to spend an hour, two  
3 hours, three hours at Hanauma Bay observing lifeguards on  
4 duty to see what lifeguards did for an hour or two or  
5 three hours?

6 A. Yes, I had that opportunity. I did not do that  
7 opportunity for two reasons. One, it was not necessary.  
8 And two, even if I had it wouldn't be, I don't think,  
9 admissible because things have changed over time. And  
10 what I observed for a simple hour cannot be extrapolated  
11 to apply to the specific hour that this event occurred,  
12 which is another reason for not doing it.

13 The point is not what happened in the hour that  
14 led up to this accident. The point is do you have a  
15 reasonable risk management program. For that, if you look  
16 at the big picture and you say you have four individuals  
17 at most who are told to allocate 42 percent of their time  
18 to the task of monitoring the water, the laws of  
19 statistics are going to tell you you have less than two  
20 lifeguards monitoring the water on the average any given  
21 point in time. That's not safe.

22 Q. Doesn't that make an assumption that the entire  
23 day is spent divided up into eight hours when the general  
24 public is there?

25 A. No, sir.

00174

1 Q. Because, for example, instead of eight hours in a  
2 day, it was seven hours in a day when the public was there  
3 that the lifeguards were on duty. So they could take one  
4 hour of everyday and spend it doing the non-lifeguarding  
5 duties that may come up.

6 A. I take that as a hypothetical. That's one hour  
7 out of eight. We've just increased it by 12 percent. So  
8 now rather than 1.6 we're up to 1.8. You are still far  
9 short. In other words, you can tweak the numbers all you  
10 want. The bottom line is with four people, and them  
11 supposed to spend 40 percent of their time monitoring, you  
12 are not anywhere close to having enough eyes watching,  
13 given the complexity of this task.

14 Q. How many eyes do you need for the complexity of  
15 the task?

16 A. I think we've been over this a lot. You know who  
17 I'm going to defer to. I wasn't asked to design a water  
18 safety program for here. And I'm not qualified to design  
19 one. My expertise is in safety and risk management.

20 Q. Surely using this analysis and your knowledge of  
21 scanning, focusing, number of people on average, you can

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22 come up with a number that would meet your criteria?

23 A. No, sir, I cannot do that.

24 MS. WATERS: Objection. Asked and answered.

25 THE WITNESS: I'm not qualified to do that. I

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1 would need to have domain specific expertise in  
2 lifeguarding, which is not the area that I'm offering  
3 testimony here. It's in safety and human factors.

4 BY MR. REINKE:

5 Q. In your report number one, Exhibit 1, page 4, the  
6 very bottom of page 4, under Lifeguard Goodwin, you  
7 indicate that the city and county failed to close the  
8 outer reef on the day of the incident. Do you see that?

9 A. Okay.

10 Q. What do you mean they failed to close it?

11 A. What I mean is my understanding is there were  
12 multiple people that were out in that outer reef area, an  
13 area that was closed, that should not have been there.

14 Q. On page 5, under Lifeguard Dorr, you noted that  
15 if a swimmer or snorkeler remains motionless for  
16 30 seconds, then a rescue is initiated. Do you see that?

17 A. I do.

18 Q. What's the relevance of that to this case?

19 A. The relevance to that in this case is go back to  
20 the numbers that we were just talking about. You got  
21 2,000 people you are trying to monitor. Let's have all  
22 four lifeguards 100 percent of the time doing nothing but  
23 monitoring. That's 500 people per lifeguard. If you have  
24 to watch somebody for 30 seconds before you decide to go,  
25 that's 250 minutes before you can complete your cycle to

00176

1 get back to the first person. That's over four hours. I  
2 think it illustrates the absurdity of having 1.6 people  
3 trying to monitor this situation.

4 Q. We went over numbers at the beach that day.  
5 There were about 1,000, 2,000 people at Hanauma Bay; is  
6 that correct?

7 A. No, sir. I believe there were 3,700 paid  
8 visitors that day.

9 Q. How many would have been there at any specific  
10 time during that day, do you have any information on that?

11 A. No. This would have been a prime time in the  
12 sense it's in the peak part of the day, around the hot  
13 part of the day, but not too hot, 11 o'clock.

14 Q. Did you happen to find in your review of the  
15 testimony any evidence as to how many people were in the  
16 water at or around the time of the incident?

17 A. I don't specifically recall that. There might be  
18 some, but I don't recall it.

19 Q. So you actually have no way of knowing how many  
20 people were in the water at that time, do you?

21 A. No, sir. That conclusion does not follow my  
22 previous answer at all.

23 Q. Actually you are right. You know of at least 20  
24 people, from Mrs. Powell's testimony, correct?

25 A. No, sir.

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1 MS. WATERS: Objection. Misstates his testimony.

2 THE WITNESS: I know there was at least 15 to 20  
3 in the outer reef. I know that if you have 3,700  
4 registered paying guests there for the day and it's  
5 11 o'clock in the afternoon, that at that period of time  
6 you will have multiple hundreds of people in the water.

7 BY MR. REINKE:

8 Q. Multiple hundreds?

9 A. Correct.

10 Q. Someplace between 200 and 900?

11 A. I would be shocked if there was only 200 people  
12 in the water at 11 o'clock on a warm, blue, sunny day when  
13 there were 3,700 paid guests.

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14 Q. So 200 would be the low end that would be  
 15 shocking. Would 3,700 on the high end be shocking?  
 16 A. I don't believe you would ever have 3,700 in the  
 17 water at the same time on a day when there was 3,700  
 18 people paid.  
 19 Q. You can't tell me within a hundred how many  
 20 people were in the water during the Powell, Laughlin  
 21 second snorkel trip, can you?  
 22 A. No. But you don't need to. If you take a  
 23 conservative low number and say 200, and say 100 percent  
 24 of your lifeguards are 100 percent of their time  
 25 monitoring, you still got 50 people that each lifeguard is  
 00178

1 watching. According to Goodwin, you have to make sure  
 2 that within 30 seconds they've moved. You can't possibly  
 3 get through those people in that length of time. That's  
 4 at 200. We know there's going to be more than 200 people  
 5 in the water, for goodness' sake.  
 6 Q. Once again you are still not able, using that  
 7 statistical analysis, to tell me the minimum number of  
 8 guards in the water, guards you need to protect the people  
 9 in the water?  
 10 A. No. That's not been my goal and task. If you do  
 11 something that fails, a steel cable breaks, you can  
 12 calculate the strength of that cable and you can calculate  
 13 the weight it was on and show that it's guaranteed to  
 14 fail. That's an entirely different question than saying  
 15 well, what size cable should I have had.  
 16 Q. Paragraph six on page 4 you talk about mitigating  
 17 the hazardous conditions.  
 18 A. Page 4?  
 19 Q. Page 4 of Exhibit 1, paragraph six. When you say  
 20 effectively mitigating, what do you mean, preventing?  
 21 A. You can't prevent 100 percent of accidents. You  
 22 can't make something 100 percent safe.  
 23 Q. Paragraph nine you refer to Mrs. Powell's  
 24 subjective perception of the dangers or hazards; is that  
 25 correct?

00179  
 1 A. Correct.  
 2 Q. Did you ever speak with Mrs. Powell about this?  
 3 A. No, I did not speak to her. I just read her  
 4 deposition.  
 5 Q. You were never able to explore this issue with  
 6 her, were you?  
 7 A. I thought it was self-explanatory in her  
 8 deposition.  
 9 Q. Did you attempt to verify your hypothesis that  
 10 the hazards associated with Hanauma Bay are hidden from  
 11 the novice user?  
 12 A. Verify in what manner? It's stated in somebody's  
 13 sworn statement. It's been my own experience from having  
 14 been there multiple times. It's based on my analysis of  
 15 people's ability to perceive a hazard. There's several  
 16 things that go into that.  
 17 Q. Mrs. Powell talks about dangers associated with  
 18 Hanauma Bay. What dangers are associated with Hanauma  
 19 Bay?  
 20 A. I didn't do an exhaustive analysis of all of  
 21 those. The danger that's most relevant here is the danger  
 22 of death by drowning.  
 23 Q. Isn't it true that all waters pose the danger of  
 24 death by drowning?  
 25 A. There is a potential with all water that's deep

00180  
 1 enough for that to have occurred. But the potential is  
 2 greatly different in certain settings. And the data  
 3 speaks volumes about how high the potential is here when  
 4 you have seven drownings in the three to four months  
 5 leading up to the Powell, Laughlin drowning.



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6 Q. Who is Captain Tsue?  
 7 A. Somebody that was referred to in the discovery  
 8 material. I think it may have been either a news  
 9 broadcast or one of the newspaper articles. But I can  
 10 look at my notes and tell you.  
 11 Q. Do you know what position Captain Tsue holds?  
 12 A. No, sir, I don't.  
 13 Q. Do you know if he has any specific knowledge with  
 14 regards to Witch's Brew?  
 15 A. I would have to look to see who he is before I  
 16 can provide an answer to that.  
 17 Q. You cited to him?  
 18 A. I did. I just don't have memorized off the top  
 19 of my head his position or where that information came  
 20 from. But I can locate it for you easily enough.  
 21 Q. How about Captain Crone, do you know who he is?  
 22 A. Again, I believe he was one that was interviewed  
 23 on the news. Beyond that I'm not certain.  
 24 Q. You aren't able to tell me whether he has any  
 25 specialized knowledge or information with regard to

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1 Hanauma Bay or Witch's Brew; is that correct?  
 2 A. I can tell you what his knowledge is if you let  
 3 me go to my file notes and look it up. I just don't have  
 4 it memorized.  
 5 Q. Would you turn to page 1 of your report. This is  
 6 number one. You list in paragraphs one, and continuing on  
 7 to page two, 29, the documents and things and activities  
 8 you conducted in reaching your opinion; is that correct?  
 9 A. I did.  
 10 Q. Is that an inclusive list of everything?  
 11 A. I did the best that I could at the time I wrote  
 12 this report to identify them, yes, sir. Subsequent to  
 13 that I obviously reviewed additional information.  
 14 Q. You also reviewed the Maceo report?  
 15 A. Correct.  
 16 Q. We would add the Maceo report to this list?  
 17 A. Correct.  
 18 Q. What else would you add to this list?  
 19 A. His report and the associated exhibits. I don't  
 20 recall anything else off the top of my head.  
 21 Mrs. Powell's deposition is on here. I don't recall  
 22 anything off the top of my head.  
 23 Q. Page 3 of your report, Exhibit 1.  
 24 (Mr. Mayeshiro leaves deposition proceedings.)  
 25 Q. You talk about what is known or unknown to most

00182

1 of the visitors in paragraph three.  
 2 A. Yes, sir.  
 3 Q. How did you arrive at that conclusion?  
 4 A. Several things. One is the observations that you  
 5 make when you stand at the top of the hill and look down.  
 6 Second is through my experience over the years here in  
 7 Hawaii and other cases that I've been involved with here  
 8 in Hawaii, that the typical Mainland tourist does not  
 9 appreciate and understand the complexities of the ocean,  
 10 oceanography issues and so forth. So the combination of  
 11 those things would be the two primary things.  
 12 MR. REINKE: Off the record.  
 13 (Recess taken.)  
 14 MR. REINKE: Back on the record.  
 15 Q. On page 8 of your report.  
 16 MS. WATERS: Still on the first report?  
 17 MR. REINKE: First report, yes.  
 18 Q. Under implementation, paragraph one, you refer to  
 19 Hanauma Bay protocol for closing the outer reef Witch's  
 20 Brew area. What are you referring to?  
 21 A. The items that we've talked about earlier where  
 22 there was a process by which the water safety officers  
 23 made a decision to close certain areas.



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24 Q. You seem to suggest that rough is the standard in  
25 your first portion of that paragraph. It was noted as

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1 rough and therefore or according to the protocol should  
2 have been closed.

3 A. If you let me look at my notes I can tell you  
4 which water safety officer said when it's rough conditions  
5 it should be closed.

6 Q. Was there any explanation what those water safety  
7 officers meant by rough?

8 A. I don't recall them being asked that. I know the  
9 form that they have for the incident report as normal,  
10 choppy, rough, and other. Some of the water safety  
11 officer marked choppy and some marked rough.

12 Q. On that same day?

13 A. That's correct.

14 Q. You're suggesting that there's an automatic, if  
15 it's rough it's shut down?

16 A. No, sir.

17 Q. You don't intend to suggest that?

18 A. What I am reading as I read what's written here,  
19 that the incident notes said that it was rough. And that  
20 according to the depositions that I believe that I read,  
21 that when the conditions are rough the outer area is to be  
22 closed down. Now, how they arrive at those determinations  
23 of what's rough or not I can't tell you.

24 Q. Would that make a difference in terms of at least  
25 paragraph one as to whether or not under the Hanauma Bay

00184

1 protocols it should have been closed down, how that rough  
2 is defined?

3 A. I don't care how it's defined. All I care about  
4 is that a water safety officer tells me under oath in his  
5 deposition when it's rough such as it was on the date of  
6 the accident, this area should have been closed. Then  
7 that's sufficient for me to conclude it should have been  
8 closed. Again, as I recall, there's no dispute amongst  
9 the officers that it was supposed to be closed.

10 Q. We haven't defined what closed means yet, have  
11 we?

12 A. Well, I don't know that we set out a verbal  
13 description. My understanding of closed is that people  
14 are not permitted to be in the area. That it's unsafe.  
15 It's dangerous. They shouldn't be there.

16 Q. And would you look at your notes with respect to  
17 the Bregman deposition and tell me where you found the  
18 information regarding buoys to mark rough dangerous areas  
19 that's marked on paragraph seven on page 9.

20 A. I just was finding it in my notes first. It's  
21 between pages 56 and 60. I would refer you to the  
22 discussions on page 57.

23 Q. May I see that real quick?

24 A. Sure.

25 Q. May I see page 58?

00185

1 Isn't it true that the buoys you were talking  
2 about were ones in the channel?

3 A. I think that's correct. When he was around the  
4 only ones that they would place at the inside of the  
5 channel to mark where it was, and then indicating I don't  
6 know where that was.

7 Q. Did you take from that testimony that they use  
8 buoys to mark rough and dangerous areas throughout the  
9 bay?

10 A. I wouldn't draw that extreme an interpretation.

11 Q. You also indicate that he testified that they  
12 were not up on the day of the Powell, Laughlin incident?

13 A. I believe I said that also, yes, sir.

14 Q. Those were the channel buoys, correct, that were  
15 not up on the day of the incident, correct?

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16 A. I would not draw that conclusion necessarily.  
17 That would certainly be a reasonable inference from this  
18 passage.

19 Q. You are not trying to suggest in your paragraph  
20 seven that there were buoys at Witch's Brew to mark as a  
21 rough or dangerous area at any time, but that they weren't  
22 up on the day of the incident?

23 A. No, no, I did not mean to infer that.

24 Q. We're done with that area then.  
25 Paragraph nine on the same page, 9, Moses

00186

1 testified that, then on B, he saw either Powell or  
2 Laughlin swim around Witch's Brew point, yet he took no  
3 actions to intervene.  
4 We've discussed that before, correct?

5 A. We have.

6 Q. We discussed the direction he saw them swim, and  
7 we don't know from his testimony, correct?

8 A. I would draw that conclusion.

9 Q. The following sentence, particularly disturbing,  
10 that wasn't Moses' testimony, was it?

11 A. No. That's why I said it is noted at the  
12 beginning of the sentence.

13 Q. Then when you go on to say clearly Lifeguard  
14 Moses, then you talk about him and his duties?

15 A. Correct.

16 Q. Would this area, talking about what the  
17 lifeguards did or didn't do in response to the incident,  
18 would that be more in lines of a WSO's expert area of  
19 expertise as opposed to your expertise as a human factors  
20 expert looking at the whole system?

21 A. No. I think it's one of those areas that you  
22 have overlap. I think a domain specific expert can talk  
23 about the training, skills, and protocol that they would  
24 have gone through, the kinds of behaviors that he would  
25 expect to have happen and so forth. But from a pure

00187

1 safety point of view, I believe I can make the statements  
2 that I've made there.

3 Q. Of course you can make them. You did.

4 A. I believe I have the expertise to make the  
5 statements that are made there.

6 Q. How quickly should WSO Moses have acted in order  
7 to perform his duties, how quickly after he noted them  
8 swimming around Witch's Brew point?

9 A. I would say it was before then. He should have  
10 noticed them before they ever got there, well before they  
11 ever got there. That's where we talked about before where  
12 you have to be able to intercept before they get to the  
13 zone of danger. They're already there.

14 Q. If he hadn't seen them before they got there?

15 A. We're allowing that mistake to have already  
16 occurred.

17 Q. Whether that's a mistake or not. If he hadn't  
18 seen them before they got there, and then he saw them for  
19 the first time when they were swimming in or out of  
20 Witch's Brew point, how long did he have between the time  
21 he first saw them before he was required to take action?

22 A. The first part of your question was whether it  
23 was a mistake or not. It was a mistake to have not seen  
24 them get there. Notwithstanding, immediately upon  
25 recognition that they are where they are at, he should

00188

1 have responded. Because you already have somebody in the  
2 position that they are inside your buffer or margin of  
3 safety for responding. You can't get there in time at  
4 this point. So why are you waiting to see -- It's already  
5 a bad situation. Waiting is only making it worse.

6 Q. So there's no margin of time, immediately  
7 respond?

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8 A. Absolutely. They're already inside that buffer  
9 of safety. You can't get there in time. So you need  
10 to -- Seconds are precious. You need to respond now.

11 Q. If he had responded immediately is it your  
12 opinion that this accident wouldn't have occurred?

13 MS. WATERS: Objection. Vague and ambiguous to  
14 accident, which victim.

15 THE WITNESS: I don't think I have sufficient  
16 information to be able to answer that question.

17 BY MR. REINKE:

18 Q. You can't say then whether this failure played  
19 any role in causing this accident, can you?

20 A. Which failure are you talking about?

21 Q. The one you are discussing here specifically in  
22 9 B.

23 A. The one I'm discussing in 9 B is meant to cover  
24 the whole intervention from the moment that the Powell,  
25 Laughlin team left the zone of safety and proceeded

00189  
1 towards the zone of danger. That's the part of the  
2 question you threw out in the beginning.

3 Q. Isn't the problem you are not able to identify  
4 where the zone of safety begins and ends?

5 A. You mean an exact precise line?

6 Q. Correct.

7 A. I can't give you an exact precise line. My  
8 understanding is you are not supposed to be out in the  
9 outer reef, which means through the slot. Neves'  
10 testimony, he was there supposedly there earlier in the  
11 day on a surfboard telling people it's not safe.

12 Q. Urging people not to go out there?

13 A. That's right.

14 Q. We've been through that pretty carefully with  
15 respect to Mr. Powell and Mr. Laughlin. Is it your  
16 opinion then once someone got outside the slot, that the  
17 WSO should have responded and immediately initiated a  
18 rescue attempt?

19 A. No. I think we've talked about that at length.  
20 Once they've gotten outside the slot they're already in a  
21 place they shouldn't be. Which means you need to warn  
22 them.

23 Secondly, if you see them outside the slot and  
24 they are proceeding in a direction away from desirable  
25 snorkeling, towards an area that you know is even more

00190  
1 dangerous and closed, that heightens the sense of urgency  
2 in which you've got to respond.

3 Q. If they're swimming or snorkeling competently  
4 with no sign of distress, does that lessen your duty?

5 A. No, sir, it doesn't. Again, they're in an area  
6 that they're not supposed to be in to start off with, and  
7 they're proceeding into a more dangerous area.

8 Q. Aren't all these 15 to 20 people in an area  
9 they're not supposed to be?

10 A. That's my understanding.

11 Q. If they're all in an area they're not supposed to  
12 be, under your view of the facts of this case, shouldn't  
13 the WSO's initiate rescue attempts for all those people?

14 A. Yes. Which is why I'm faulting the whole system  
15 because you let people out in a zone of danger. You choke  
16 it off at the choke point. You provide information to  
17 them when they come in and pay their fees. That's your  
18 first choke point. You provide information at the  
19 channel, at the slot. But you don't just let them go in  
20 an area that you know is dangerous and just ignore it and  
21 hope for the best.

22 Q. Page 7 of the report.

23 A. I'm sorry if I sent the report to you out of  
24 order so bad.

25 Q. You didn't. I got it page after page. I just

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00191

1 approach it more logically than you did.

2 A. I knew I'd find what I did wrong somehow.

3 Q. Paragraph six, sub-section B, you once again give  
4 what appears to be some type of summary of what Mr.  
5 Bregman says and then you editorialize; is that correct?

6 A. Yes. I apology for that. I try to always say  
7 note or put in parentheses when it's my comment and not  
8 theirs. And I did not do that apparently in this  
9 paragraph.

10 Q. Or in this whole report?

11 A. It looks like there's a couple of times I haven't  
12 done that, that's correct.

13 Q. I want to make clear there's times when you do  
14 give your review or comments upon your summary of their  
15 testimony. So we can go through this report and do this  
16 item by item. But if you say noted or clearly, what  
17 you're trying to do is set off the fact that that is not  
18 testimony, correct?

19 A. Correct.

20 Q. It's your interpretation or your analysis,  
21 correct?

22 A. More often than not it's my comment about why  
23 that's relevant to the facts of the case.

24 Q. On page 8, paragraph ten, the water side of  
25 Witch's Brew point. I just want to make sure whether or

00192

1 not you're referring to the area we've identified as  
2 Witch's Brew that they can't see or this side that's  
3 inside the bay with that comment on paragraph ten?

4 A. I understood him to mean the black circle on  
5 Exhibit 3 and the surrounding rings.

6 Q. So up to Witch's Brew point, that water you could  
7 see, correct?

8 A. Correct.

9 Q. Under evaluation, page 10, paragraph one, you  
10 give a daily visitor count of 1,500 to 2,000. Where did  
11 that number come from?

12 A. I think that was the estimates that were provided  
13 in the deposition testimony by the various water safety  
14 officers.

15 Q. Paragraph three, your review of Dr. Lukas'  
16 report, you state that Dr. Lukas notes there are no  
17 natural flows or currents from the reef area of Hanauma  
18 Bay to directly in front of Witch's Brew. Is that  
19 correct?

20 A. I don't believe I refer to his report. I think  
21 it was a phone conference with him.

22 Q. What was the importance of that to you?

23 A. The length of time that it would take for someone  
24 to get from the inner reef to where the bodies were  
25 located and found, where Mr. Laughlin was spotted coming

00193

1 around the point.

2 Q. Is it also important because it shows that the  
3 water didn't necessarily push them over to Witch's Brew,  
4 but they consciously or unconsciously snorkeled in that  
5 direction?

6 A. I appreciate the correction to your question. I  
7 don't think they consciously did it. I think you could  
8 conclude they were swimming, and through their swimming  
9 that that was the primary mode of transportation that got  
10 them there as opposed to being blown there strictly or  
11 drawn there by current strictly.

12 Q. We don't know whether they consciously or  
13 unconsciously chose to go there; is that correct?

14 A. I would agree with that.

15 Q. I want to go to your documentation section again.  
16 You discuss documentation being important for controlling  
17 risks; is that correct?

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18 A. Correct.

19 Q. With respect to this section on documentation,  
20 whether any of these circumstances were actually  
21 occurring, that is, whether there were evaluations,  
22 whether there was training or strategies or protocols, in  
23 this section you're not necessarily saying those things  
24 don't exist, but in fact they should be documented,  
25 whether they exist or not, correct?

00194

1 A. They can't be documented if they don't exist.  
2 But they need to be documented is what I'm saying. And  
3 these are things that I saw that there was not  
4 documentation for.

5 Q. You're not necessarily saying that each one of  
6 these things didn't occur?

7 A. I'm saying there's no documented evidence that  
8 they occurred. And there should have been.

9 Q. With respect to the training issue, you're not  
10 trying to discuss what training that the WSO's should  
11 have, are you?

12 A. No. You're starting to get into area of somebody  
13 like Mr. Ebro.

14 Q. You are not going to get up at trial and say  
15 these people should have been trained the following way?

16 A. No, no. If you are going to hire somebody that  
17 is a water safety officer you should have documentation  
18 that they are certified, licensed, and properly trained.  
19 If you are going to require them to have site specific  
20 training, which I think is appropriate for the unique  
21 characteristics of something like Hanauma Bay, that you  
22 should document two things, what that training was and the  
23 fact they were, in fact, given that training. You see  
24 that in OSHA, for example, all the time for something as  
25 simple as using a ladder.

00195

1 Q. Hypothetical situation. If in connection with  
2 the location of Hanauma Bay known as Witch's Brew there's  
3 been no documented drownings prior to the two that are in  
4 this case, would you expect to see any post-doc  
5 investigations of drowning incidents in Witch's Brew?

6 A. Of course not. If you don't have any  
7 investigated accidents you can't have documentation of an  
8 investigated accident.

9 Q. In connection with this case with respect to the  
10 drownings of Mr. Powell and Mr. Laughlin, would the fact  
11 that it hasn't been documented in this case, as you say  
12 there's no documentation regarding that, would that fact  
13 have done anything to change the outcome of the second  
14 snorkeling trip of Mr. Powell and Mr. Laughlin?

15 A. The no documentation on their drownings?

16 Q. Right.

17 A. No. It's after the fact. The reason I brought  
18 that out is it's evident that they don't document  
19 drownings properly when they occur. And, therefore, they  
20 don't afford themselves the opportunity to do a proper  
21 post-doc analysis. And, therefore, they don't afford  
22 themselves the opportunity to learn from somebody else's  
23 death what kind of preventive measures may make it safer  
24 to prevent a future death. So that's the relevance that  
25 this kind of information has.

00196

1 Q. Have you done any analysis of any of the other  
2 drowning incidents?

3 A. Again, I can't because they're not documented by  
4 the city and county. I can't analyze something that's not  
5 there.

6 Q. You've not seen an incident report for any of the  
7 other drowning incidents?

8 A. There's not sufficient documentation.

9 Q. Have you seen a drowning report of any of the

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10 other incidents.

11 A. I'm not certain. I think there may have been one  
12 or two, but certainly not all the incident reports for all  
13 the drownings that were reported.

14 Q. Did you ask your attorneys to request the  
15 post-doc investigations for any of the other drownings in  
16 2002?

17 A. I don't believe I did.

18 Q. Would that be important to determine if there was  
19 any documentation on post-doc investigations?

20 A. Well, as I read the interrogatories and request  
21 for production of documents, that would have been  
22 provided. That's all I can tell you.

23 Q. Was there a specific request for the  
24 investigations that you can recall?

25 A. I believe they asked for all documentations and

00197  
1 reports of prior drownings. I'm paraphrasing it  
2 obviously.

3 Q. Do you know if it would have been more effective  
4 in order to conclude that there was no post-doc  
5 investigations if you'd ask for post-doc reports?

6 A. The question is how far does one proceed before  
7 you feel you've exhausted all possibilities. If there's  
8 post-doc accident investigation reports I hopefully will  
9 see them. If not soon, then by the time of trial.

10 Q. In the conclusion section you discuss, if you  
11 look at your second full paragraph -- why don't you just  
12 read that to yourself real quickly.

13 A. The one that starts it is particularly?

14 Q. Yes.

15 A. Okay.

16 Q. You have series there. Did you mean serious  
17 there on the second line?

18 A. No. Let me read it again.

19 Q. Read it again.

20 A. Serious, right. There were a series of drownings  
21 but it was a serious hazard. Thank you.

22 Q. The next sentence which goes on for quite some  
23 time, did you discuss the failure of the city to control  
24 such a deadly hidden hazard?

25 A. Yes, sir.

00198  
1 Q. Was that a reference back to the drowning hazard?

2 A. Yes.

3 Q. Other than the fact that there was a drowning as  
4 a cause of death, can you tell me what the other  
5 relationship is between the other drownings and the  
6 drownings that are at issue in this case?

7 A. As far as I understood they were at a point in  
8 time when the bay was open and people were there, paid  
9 patrons, to go snorkeling. There were lifeguards on duty.  
10 That the protocols were in place. And the drownings still  
11 occurred. So whatever safety protocols there are, from  
12 the moment the patron arrives at the parking lot until the  
13 time of death, something needs to be improved in order to  
14 reduce this risk of drowning.

15 Q. You indicate that Mr. Laughlin and Mr. Powell did  
16 do nothing to negligently contribute to their deaths. Do  
17 you see that?

18 A. I do.

19 Q. How do you reach that conclusion?

20 A. Well, all the evidence that I've had. And we  
21 went through it a lot. They're not guilty of errors of  
22 omissions or errors of commission. They were certainly  
23 physically qualified to do what they are doing. They had  
24 snorkeling experience ad infinitum. We have no evidence  
25 to suggest anyone intervened and told them not to go where

00199  
1 they were. We have no evidence to believe that or suggest

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2 that they're the type of individuals that if a position of  
3 authority and authority figure said this is dangerous,  
4 don't go out here, that they would have chosen to engage  
5 in that kind of activity.

6 Q. Isn't it true we don't know what happened out  
7 there?

8 A. Well, we don't know in detail what happened. But  
9 I believe we know enough to draw the conclusion on a more  
10 probable than not basis that they didn't do anything to  
11 contribute to their accident.

12 Q. How can you say that not knowing what happened  
13 out there?

14 A. Because it's not what happened out there. It's  
15 the fact that they got out there. Everything they did  
16 leading up to the moment of whatever ultimately happened,  
17 in my opinion they didn't do anything wrong. There's no  
18 evidence to suggest that. One can speculate that water  
19 safety officer Neves was on his surfboard and stopped them  
20 and said don't go and they both blew him off and swam out.  
21 I don't think there's any basis for such wild speculation.  
22 Certainly inconsistent with the type of people that I  
23 understood them to be. So I see no basis to conclude that  
24 they did something wrong.

25 Q. You don't know what happened once they were out

00200

1 of everybody's sight, do you?

2 A. No. I can't imagine that they did something  
3 intentionally and deliberately to put themselves at risk.  
4 There's no basis for that.

5 Q. In your rebuttal report you take exception to  
6 Major Maceo's claims that Witch's Brew was not an area  
7 that was monitored by the WSO's. Do you see that?

8 A. I do.

9 Q. Haven't we made it clear in this deposition you  
10 can't even see into Witch's Brew from the tower?

11 A. No, sir, I don't think we have. There are  
12 portions you can't see into, but not the entire area.  
13 Again, all you need to do is take the second lifeguard  
14 stand that I believe you can see on this photograph, and  
15 draw a straight line from it and across, and the black  
16 circle is, in fact, within sight, or at least a portion of  
17 it.

18 Q. Have you tried to go and look into Witch's Brew  
19 from either of those towers?

20 A. No. I don't have to.

21 Q. Did you stand next to those towers and try to  
22 look into Witch's Brew?

23 A. I don't have to. We have a photograph right in  
24 front of us. You can draw a line on the photograph and  
25 see exactly the limitations of where you can and can't

00201

1 see.

2 Q. So that's what you base your opinion on?

3 A. No. I think there's also testimony from the  
4 water safety officers that disagree with the major.

5 Q. How about from the tower where WSO Moses was,  
6 draw the line from there and what do you get?

7 A. You can see a portion of Witch's Brew, but not as  
8 well as you can from the other side. Even from that tower  
9 you can almost see the edge of the black circle. That's  
10 just the center of it, center of Witch's Brew. So  
11 certainly even from the tower in the worst location you  
12 can still see a portion of it.

13 Q. Where does the dangerous condition in Witch's  
14 Brew begin?

15 A. It's the entire area.

16 Q. Why is the entire area dangerous?

17 A. Because of the chop. I think again it was  
18 Goodwin that testified it was like a washing machine in  
19 there where the surface of the water is chop. I think Dr.



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20 Lukas testified about how dangerous the area was. And he  
21 didn't even want to go into it on a surfboard.

22 Q. You talk about WSO wasting valuable surveillance  
23 time by watching an area to which he was not assigned to  
24 monitor?

25 A. Right.

00202

1 Q. What do you mean by that?

2 A. Major Maceo can't seem to make up his mind. On  
3 one hand he says nobody is supposed to monitor this area.  
4 And then on the other hand he's saying well, Officer Moses  
5 was doing an excellent job at surveying the water and  
6 fulfilling his duties because he identified the person.  
7 What are you doing spending your time looking in an area  
8 that you're not supposed to look when you got 2,000  
9 swimmers and an average of 1.6 lifeguards? He ought to  
10 make up his mind which side of the fence he's on here. If  
11 you're not supposed to be monitoring that area you don't  
12 give somebody an attaboy for monitoring.

13 Q. WSO Moses ever state that he was monitoring  
14 inside Witch's Brew point?

15 A. No.

16 Q. He was monitoring on the side, the beach side of  
17 Witch's Brew point, wasn't he?

18 A. No. I don't believe he states that either. I  
19 think he states all we can say is that he saw a swimmer  
20 coming around the point. Look where the point is relative  
21 to where the swimmers are supposed to be inside the inner  
22 reef. What in the world are you doing looking way out  
23 here when you are assigned the job of looking in where the  
24 people are?

25 Q. People snorkeling where they're not supposed to

00203

1 go, wouldn't that be a reasonable explanation?

2 A. I don't believe it would. I believe a reasonable  
3 explanation, if he was doing his job, is identifying the  
4 people heading in that direction and cutting them off  
5 then. Not waiting until they're already in harm's way and  
6 then saying, oh, we'll give you an attaboy for finding  
7 them. You don't praise somebody for doing a great job at  
8 surveillance if, A, it's a closed area, and B, they're all  
9 the way out where they shouldn't be.

10 Q. So he didn't do a good job of seeing them all the  
11 way out there?

12 A. No, I'm not saying that at all. I'm saying the  
13 major ought to make up his mind. Is that an area you are  
14 supposed to survey or not. If it's an area you are not  
15 supposed to survey, you don't give somebody a kudo for  
16 good job of surveying there. They're supposed to spend  
17 their time looking in certain areas.  
18 Secondly, if it is a job that he's supposed to be  
19 surveying, you don't give him a kudo for saying oh, good  
20 boy, you found him. You raise the question of why did you  
21 not see these two individuals until they're already all  
22 the way out here. He's got it completely out of phase.

23 Q. When Powell and Laughlin, this is hypothetical,  
24 when they went through the slot, if they had gone straight  
25 out, at some point they would not have been visible to the

00204

1 lifeguards; is that correct?

2 A. That's correct.

3 Q. Did the lifeguards have any obligation if someone  
4 goes straight out towards the ocean to intervene?

5 A. In my opinion as soon as they come down the slot,  
6 on the conditions of that day and the conditions that the  
7 water safety officers have described, that the slot was  
8 closed and you are not supposed to be in the outer reef,  
9 yes, they should have intercepted.

10 Q. We don't know how they entered the Witch's Brew  
11 area?

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12 A. Other than to say it's reasonable to conclude it  
13 was by water and not by land.

14 Q. We don't know which part of the water they  
15 entered that, do we?

16 A. No, sir.

17 Q. We don't know what efforts they made to leave  
18 Witch's Brew, do we?

19 A. No, sir.

20 Q. Did you read Mr. Ebro's rebuttal report?

21 A. I don't believe I read either of his reports.

22 Q. Do you agree or disagree that lifeguard towers  
23 send a message that say swim near a lifeguard?

24 A. I have no opinion on that one way or another.

25 Q. How do you mitigate ocean conditions?

00205

1 A. The conditions themselves you have very little  
2 control over, so you control the hazards that those  
3 conditions present to people.

4 Q. Do you believe that the agency has made a  
5 conscious decision to put beach patrons in danger?

6 A. No. I don't believe they consciously said we're  
7 going to try to kill people on this beach. I don't think  
8 that's what they did.

9 Q. Do you have any information with respect to the  
10 activities of WSO Moses on the date of the incident that  
11 would suggest that he wasn't being attentive?

12 A. Well, if I assume the hypotheticals that you've  
13 given me before --

14 Q. Do you have any information that he wasn't being  
15 attentive on the date of the incident?

16 A. If he was at his lifeguard stand in the hour  
17 leading up to this accident, yes, I believe he was not  
18 being attentive in allowing two people to get where they  
19 were. If he was on break and he just came up, then  
20 obviously it's a different situation.

21 Q. Earlier in the deposition you testified that the  
22 system required you to look at various people, the other  
23 998 folks that may have been in the water, to look at  
24 those folks. So perhaps he was doing that and he didn't  
25 see them. Would he have been inattentive to his duties if

00206

1 he was doing, as you suggested, monitoring the folks in  
2 Zone 1, and didn't get to scan up in that area?

3 A. Yes. If he went for an hour and never scanned  
4 out in that area, yes, I believe it's inattentive, and not  
5 responsible to his duties.

6 Q. Would it be negligent?

7 MS. WATERS: Objection. Calls for a legal  
8 conclusion.

9 MR. REINKE: I'll withdraw the question.

10 Q. Would it be a conscious disregard of his duties  
11 not to have seen them?

12 MS. WATERS: Same objection.

13 THE WITNESS: I think it's a conscious disregard  
14 of his duties to have not scanned well enough to have not  
15 seen two people to have gone that far and never detected  
16 them.

17 BY MR. REINKE:

18 Q. What fact other than the fact that they weren't  
19 detected leads you to believe it was a conscious disregard  
20 of his duties?

21 A. Because under the scenario that we have you are  
22 looking at a significant window of time that it would take  
23 for two individuals to get from where they left the zone  
24 of safety to the zone of danger. I don't know how  
25 somebody that was consciously performing their duties in a

00207

1 responsible manner could allow that to happen.

2 Q. Earlier in the deposition I tried to get you to  
3 give me an estimate of time. You said you couldn't do it.

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4 You suddenly come up with a significant period of time.  
5 What is significant?  
6 A. Again, I can't quantify it for you. But you  
7 asked me couldn't it have been five minutes. I said no,  
8 it had to be well over five minutes. Even just to  
9 deliberately and intentionally swim that distance you'd be  
10 hard pressed to do it in five minutes. You are telling me  
11 that a lifeguard that is supposed to be monitoring this  
12 area and scanning for potential hazards in five minutes  
13 time never once looks between the slot and Witch's Brew.  
14 That's clearly somebody that's not consciously performing  
15 their duties. And it has to be more than five minutes.  
16 Q. Say it's ten minutes. Suppose he looks up, looks  
17 in that area and simply misses them. Is that possible?  
18 A. For a trained professional lifeguard to be  
19 intentionally looking for someone for ten minutes time to  
20 not be able to see them, no.  
21 Q. You've twisted my question. Now you have him  
22 looking in that area for a specific person for ten  
23 minutes. I said during ten minutes. Is it possible that  
24 they looked in that area, scanned that area, and simply  
25 didn't see them?

00208

1 A. No. I don't believe if he was performing his  
2 duties that that's likely.  
3 Q. It's not likely. Could have happened though,  
4 couldn't it?  
5 A. Yeah. It's like a meteorite. It can hit. It's  
6 not likely. It's not a probable explanation.  
7 Q. It was choppy out there, wasn't it?  
8 A. Out in the Witch's Brew area it was, yes.  
9 Q. It wasn't choppy out in Zone 2?  
10 A. Well, based on the wind conditions I would say  
11 that there wouldn't be a significant chop.  
12 Q. It's rough out there in Zone 2?  
13 A. In Witch's Brew or in the area between the slot  
14 and Witch's Brew point?  
15 Q. The slot and Witch's Brew point.  
16 A. Water is going up and down. That's not the same  
17 as splashing and somebody swimming.  
18 Q. Water is going up and down. Are there any white  
19 caps out there?  
20 A. There may be some.  
21 Q. Hasn't it been described by people as being  
22 choppy out there?  
23 A. Definitely in the Witch's Brew area.  
24 Q. We're talking about the Zone 2 between the slot  
25 and Witch's Brew.

00209

1 A. There was some testimony in that area, yes.  
2 Q. Couldn't a snorkeler be down in the trough when  
3 you look up?  
4 A. It could happen at a glance. Over that length of  
5 time, no. What you are asking me to say is that a  
6 snorkeler could be out in an area of a zone of danger for  
7 ten minutes time and a lifeguard would never even see  
8 them. Clearly, four lifeguards can't monitor 2,000 people  
9 if a single lifeguard over ten minute span can't see  
10 somebody in an area that he's supposed to be watching.  
11 Q. Isn't it possible that a person could be scanning  
12 an area and not see a swimmer?  
13 A. On a single scan across, yes. To be actively  
14 responsibly scanning that area for ten minutes and never  
15 once see two swimmers?  
16 Q. You are assuming that the two were together,  
17 correct?  
18 A. Well, I'm assuming the two somehow got from the  
19 slot to Witch's Brew point. Whether they were together or  
20 not makes no difference. They both went by water. So you  
21 have two swimmers in the water.

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22 Q. Two snorkelers?

23 A. Correct.

24 Q. Not making any splash?

25 A. No.

00210

1 MS. WATERS: Objection. Calls for speculation.

2 THE WITNESS: I've never seen snorkelers be able  
3 to swim that distance and never splash.

4 BY MR. REINKE:

5 Q. So they're making splashes with fins, right?

6 A. Well, with their fins, if they stick their heads  
7 up out of the water, blowing water out of their snorkel.

8 To go that distance and say that they are stealth, never  
9 break the surface of the water, no, that's not likely.

10 Q. So you're saying he didn't performance his duties  
11 at that time because he didn't spot them, correct?

12 A. Correct.

13 Q. Is that a leap from saying he's consciously  
14 disregarding his duty as opposed to not performing it  
15 competently?

16 A. My belief is in order for that to have transpired  
17 over that length of time is he's not surveying that area.  
18 I don't believe it can be an accidental failure to detect.

19 He's simply just not surveying the area.

20 Q. You don't have any fact to back that up other  
21 than the occurrence of the incident; is that correct?

22 A. No. The occurrence of the incident, the knowing  
23 of the distances that are involved, the fact that people  
24 shouldn't have been there, which should have made them  
25 very salient to someone that is surveying the area.

00211

1 Q. There's no testimony that WSO Moses was not  
2 scanning the area that would have included the lead up to  
3 Witch's Brew point on the date of the incident, is there?

4 A. There's evidence that he wasn't in a sense that  
5 two people went undetected for such a long period of time.

6 Q. Is that the only evidence?

7 A. Well, I keep answering that question by  
8 correcting you and saying no, it's not the only evidence,  
9 and I add in all the other things, the distance involved,  
10 the starkness of the cue, the fact that you shouldn't have  
11 people in the area. You are not trying to pick out  
12 somebody in danger out of the sea of 2,000. You're just  
13 simply trying to identify somebody that shouldn't even be  
14 there.

15 Q. It's your opinion that you could not  
16 inadvertently miss two snorkelers in a ten minute period  
17 when you are doing your job, is that your opinion?

18 A. At least a ten minute period under those  
19 conditions.

20 Q. Couldn't inadvertently do that?

21 A. No.

22 Q. It was a conscious disregard of his job?

23 A. I believe it was a conscious disregard for  
24 surveying the area.

25 Q. Your testimony is it's your opinion that he

00212

1 wasn't surveying that area?

2 A. I think that's the most likely explanation, yes,  
3 sir.

4 Q. How about Mr. Neves?

5 A. It would apply to all of the lifeguards that were  
6 on duty. I can't believe if they're going to see somebody  
7 swimming in harm's way and do nothing. Either way it's a  
8 conscious disregard.

9 Q. It's your opinion that all the lifeguards on duty  
10 on that day and all the parking attendants and everybody  
11 else failed to notice these people?

12 A. Either A, failed to notice them, or B, they  
13 noticed them and didn't do anything. I can't tell you

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14 which it is.

15 Q. Well, does that make a difference?

16 A. In terms of the overall opinion that it was such  
17 a dereliction of duty to allow these two men to get where  
18 they did, no.

19 Q. Do you have any opinion with respect to the  
20 training of WSO Nevis or WSO Moses?

21 A. No, sir, I don't. I would defer to Mr. Ebro on  
22 that.

23 Q. Any opinions with respect to their physical  
24 condition on the date of the accident?

25 A. No, sir.

00213

1 Q. Are you aware of any distractions that may have  
2 prevented them from doing their duties on the date of the  
3 accident?

4 A. No, sir.

5 Q. Other than that area we just discussed, you're  
6 not aware of anything other than that area which would  
7 have prevented them from doing their duties on the date of  
8 the accident, correct?

9 A. That's correct. Well, no. Excuse me. The  
10 evidence that we have of multiple people in an area that  
11 was closed and still nothing was done.

12 Q. With respect to the institution of a megaphone or  
13 a loudspeaker at Hanauma Bay, would you defer to the water  
14 safety expert with respect to the effectiveness of that  
15 type of a device to warn people?

16 A. No. That's a basic human factors issue that I  
17 would offer testimony.

18 Q. Tell me what you would do, tell me what system  
19 you would put in place with respect to loudspeakers or  
20 megaphones.

21 A. That's beyond the scope of what I was asked to  
22 do.

23 Q. What testimony would you give with respect to  
24 loudspeakers or megaphones?

25 A. The testimony that I would offer is that given

00214

1 the large expanse that you need to cover and the limited  
2 staffing that you got, one of the ways you can improve the  
3 effectiveness of that staffing is to be able to provide  
4 what we call just in time warnings. As a person begins to  
5 approach an area where they need correction, if you can  
6 call attention to that fact, I believe in a setting like  
7 this that would be an effective warning. It's much more  
8 effective than what we call passive warning, such as a  
9 warning sign.

10 Q. Do you need environmental assessment per those  
11 types of devices for loudspeakers and megaphones?

12 A. I don't know that.

13 Q. You've also mentioned the use of jet skis?

14 A. Correct.

15 Q. How would you use a jet ski at Hanauma Bay?

16 A. Again, that's beyond the scope of what I've been  
17 asked to do. But I can tell you some of the concepts  
18 behind which you would use them.

19 Q. But it's beyond the scope of what you've been  
20 asked to do?

21 A. I've not been asked to design a jet ski program.  
22 But I've identified that as a means to enhance safety.

23 Q. Do you know if it's even viable at Hanauma Bay?

24 A. Yes, I believe it is. They brought one around  
25 for the rescue.

00215

1 Q. On an ongoing regular basis do you know if it's  
2 viable to have a jet ski at Hanauma Bay?

3 A. I don't see any reason why it would not be.

4 Q. You've done no investigation in that regard  
5 though, have you?

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6 A. I don't believe an investigation is necessary.  
7 You have road access that you can bring supplies and  
8 equipment down to it. You have an easy means of pulling  
9 it out of the water to protect it when it's not in use.  
10 There are a number of things you can use a jet ski for to  
11 enhance your water safety program.

12 Q. Do you believe that if there aren't enough WSO's  
13 available to effectively lifeguard the beach the beach  
14 should be shut down?

15 A. That would be an alternative. I'm not proposing  
16 that.

17 Q. By the way, you are assuming that WSO Moses never  
18 saw Mr. Powell or Mr. Laughlin as they swam towards  
19 Witch's Brew point, correct?

20 A. No. I think we just talked about that a few  
21 minutes ago. There's one of two alternatives, either he  
22 failed to see them, or he saw them and failed to respond.  
23 Either way I'm critical.

24 Q. I want to mark this as Exhibit 6.  
25 (Exhibit 6 was marked for identification.)

00216

1 Q. On Exhibit 6, which is identical to Exhibit 3,  
2 without any of your markings though, I'd like you to with  
3 this red pen draw a line in the area where you believe  
4 Zone 2 begins.

5 A. I'll do the best I can with the descriptions. I  
6 believe Zone 2 also includes part of the slot. And if I'm  
7 not mistaken, I think it also includes part of what's  
8 called the back door area, which is not relevant to the  
9 issues in this case. But as I understand it, on Exhibit 6  
10 it would be towards the right-hand side.

11 Q. So with the red line you marked the commencement  
12 of Zone 2. Could you put a 1 in the area of Zone 1.

13 A. Zone 1 would be what is -- I'm putting dashed  
14 lines in the general area where I understand Zone 1 to be.  
15 It's the makai side of the dotted line that I put.

16 Q. Could you put a 1 in there. With a different  
17 colored pen, so we don't get too confused here, can you  
18 draw what you believe to be the outer extent of Zone 2.

19 A. I can't tell you the outer extent. I can only  
20 begin to with green dashed lines show you the areas that  
21 are most relevant to the issues in this case of Zone 2  
22 starts on the outside of the red line. I don't know how  
23 far makai it goes before it then becomes Zone 3.

24 MR. REINKE: Off the record.

25 (Recess taken.)

00217

1 MR. REINKE: Back on the record.

2 Q. Typically speaking through the course of your  
3 role as a consultant and expert witness in connection with  
4 ocean cases have you found that there's a higher than  
5 normal risk for ocean activities that's a risk of harm to  
6 a person?

7 A. No, I wouldn't say so.

8 Q. In performing your analysis have you used any  
9 particular standards for review for the staffing of  
10 beaches?

11 A. No. I would leave something like that to Mr.  
12 Ebro.

13 Q. How about regarding the duty to preventing a  
14 hazard from occurring?

15 A. That would be the basic standard of risk  
16 management and a particular fundamental principle of  
17 safety. I utilized both of those in my analysis.

18 Q. Are you aware of any national consensus with  
19 respect to ocean beach facilities and risk safety  
20 management?

21 A. The only one I can think of would be what we  
22 talked about earlier. The Peterson text is a nationally  
23 recognized text for management of parks and recreational

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24 areas.

25 Q. Are you aware of any states that have codes or

00218

1 standards for lifeguarding facilities or water safety  
2 operations at beaches?3 A. That's really beyond the scope of what I was  
4 asked to do.

5 Q. Do you know how long a person can tread water?

6 A. It depends on the individual.

7 Q. Do you have any notion of an average time for  
8 treading water?

9 A. No, sir.

10 Q. Do you know how fast a person can snorkel  
11 100 meters if they are snorkeling constantly and steadily  
12 for that hundred meters?13 A. No. I could estimate. Again, most people that  
14 snorkel are not snorkeling with the intent of going to a  
15 destination. They are just simply floating and observing  
16 and moving as they desire.17 Q. You're not, by the way, suggesting that they put  
18 signs under water, are you, in any of your opinions?

19 A. No, sir.

20 Q. When you are talking about putting signs out on  
21 in the water towards people that are approaching Witch's  
22 Brew by water what did you mean?23 A. For example, on the shoreline. So if you  
24 approach by water rather than by land you at least know to  
25 get out of there.

00219

1 Q. You're not suggesting any water based signs, are  
2 you?3 A. I haven't suggested it. I haven't ruled it out.  
4 Again, it was beyond the scope of my analysis to lay out  
5 the entire design. I was just illustrating the examples  
6 within the report.7 Q. With respect to those examples, you didn't try  
8 and do a thorough analysis of whether or not any of those  
9 examples were viable for Hanauma Bay?10 A. I didn't do a comprehensive thorough analysis to  
11 rule one out. But I believe all of them are viable.

12 Q. They're all possible at least?

13 A. Yeah. I think they are reasonable possibilities  
14 that warrant further investigation that need some pretty  
15 hard data to say no, this is not physically feasible or  
16 economically feasible.

17 Q. Or environmentally feasible?

18 A. Or environmentally feasible.

19 Q. Those are all factors that you would have to take  
20 into account in determining what you do to control the  
21 hazard?22 A. In designing the overall safety plan, that is  
23 correct.24 Q. Did you keep your children out of the water after  
25 they ate?

00220

1 A. No. I've grown up around the water and I've  
2 never done that personally. No one in my family has ever  
3 done that.4 Q. I brought this up a little bit earlier. With  
5 respect to the equipment that Mr. Powell and Mr. Laughlin  
6 had, you haven't made any effort to determine what kind of  
7 equipment they had, what kind of fins, for example?

8 A. No.

9 Q. Does it make a difference in terms of their  
10 mobility as well as their ability to escape from Witch's  
11 Brew once they got into Witch's Brew?12 A. Well, it would potentially be a factor in terms  
13 of the types of fins, the size of the fins and so forth.  
14 That's not really the issue at hand here.

15 Q. Were you aware of whether Mr. Powell or Mr.



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16 Laughlin ever approached a lifeguard for information?

17 A. I'm not aware of any evidence that they did.

18 Q. And would you agree that Mr. Powell's drowning  
19 occurred outside the view of the WSO's?

20 A. No. That's where the body was found. I can't  
21 say that's where the drowning occurred.

22 Q. You don't know if Mr. Powell drown before or  
23 after Mr. Laughlin?

24 A. I have no evidence to be able to allow me to  
25 conclude one way or another. It's not really something

00221  
1 that I was asked to do.

2 Q. You looked at the autopsy reports, didn't you?

3 A. I did.

4 Q. Do the autopsy reports have any bearing at all on  
5 your opinions?

6 A. To the extent that they were both drownings.

7 Q. Do they have any bearing whatsoever on your  
8 opinions?

9 A. No, I don't think so.

10 MR. REINKE: I don't think I have any additional  
11 questions to ask you right now. Thank you for your time.  
12 I appreciate it.

13 MS. WATERS: I have a little bit of cross.

14 EXAMINATION

15 BY MS. WATERS:

16 Q. Dr. Gill, we've been talking about your areas of  
17 expertise. And just so it's very clear, you were retained  
18 in this case by the plaintiffs as an expert in the area of  
19 human factors and risk management; is that right?

20 A. That's correct.

21 Q. And you have how many years of expertise in this  
22 area?

23 A. Oh, boy. Age is telling now. Going on 30 years.

24 Q. And in the areas of that expertise that you have  
25 been retained for in this case, are the opinions that you

00222  
1 have rendered based upon facts and data that were provided  
2 to you?

3 A. That's part of the basis of my opinions, yes,  
4 ma'am.

5 Q. And you note the data and facts that you rely  
6 upon in the reports that you have submitted; is that  
7 right?

8 A. That's correct.

9 Q. Those would include deposition reviews, site  
10 visits, other document reviews, as well as your personal  
11 knowledge and experience; is that right?

12 A. That's correct.

13 Q. What principles and methods have you used in  
14 rendering your opinions in this case?

15 A. I'd say if I started with the broadest umbrella,  
16 it would be human factors. More specifically it would be  
17 risk management, which has been around for 70, 80 years  
18 now. More specifically to that would be the fundamental  
19 principle of safety which the National Safety Council  
20 first promulgated in the early 1900's. I'd say the most  
21 specific thing would be something as specific as the  
22 Peterson textbook on Risk Management For Parks and  
23 Recreational Areas. Something I've utilized in my  
24 testimony many times.

25 Q. Are these principles and methods that you just

00223  
1 referred to reliable in your opinion?

2 A. Very.

3 MR. REINKE: Let me object. Vague and ambiguous.

4 Lacks foundation.

5 BY MS. WATERS:

6 Q. Can you explain, please?

7 A. Again, they've been around in the scientific

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community for 70, 80 years. Experts rely on them.  
There's entire professions that are developed around risk management. People can actually specialize strictly in risk management as a degree. The reason for that is because it works.

Q. In laymen's terms risk management would be ways to make a facility or procedure safer?

MR. REINKE: Let me object. Vague and ambiguous. Lacks foundation.

THE WITNESS: The whole purpose of risk management is first and foremost to be a proactive safety plan to identify potential hazards and having a systematic way to minimize exposure to the hazards. The second leg of risk management is react and the post-doc phase. Again, the notion is to minimize the potential risk of harm to individuals.

Q. The principles and methods that you referred to earlier you did apply to the facts in this case?

A. Yes, ma'am, I sure did. That was the basis by which my analysis and report was done.

Q. The theories that you applied, have they been tested?

A. Yes, ma'am, they have.

Q. And in which particular manner?

A. They've been tested over the last 70, 80 years where people implemented risk management programs such as the five basic steps that I talked about in my report, and seen a reduction in accidents.

Q. You also referred to the Peterson book that pertains to risk management in relation to park management?

A. Yes. It's what I call a domain specific risk management textbook. It's risk management specific to parks and recreational areas.

Q. Again, you would apply that to the beach park in this case?

A. Absolutely.

Q. Are the theories that you mentioned earlier subject to either peer review or publications?

A. Yes. There's countless publications and peer reviews in risk management and in fundamental principles of safety or human factors overall.

Q. Would you agree that the theories that you apply

have general acceptance in the scientific community or the human factors community?

MR. REINKE: Let me object. It's vague and ambiguous. Calls for speculation.

THE WITNESS: Not only general acceptance, I'd say broad acceptance, which is why you can get an entire degree in risk management now.

BY MS. WATERS:

Q. That's an actual bachelor's degree in human factors?

A. You can get a bachelor's, master's and Ph.D. in human factors. At minimum you can get a bachelor's degree in risk management. I don't know if they offer advanced degrees in it or not.

Q. Is the National Safety Council part of this community, scientific community?

A. Yes. It's supported by the federal government. Again, it's been around almost a century.

Q. In addition to the Peterson book and ANSI, I think you mentioned, are there any other treatises, publications, data that you relied on in forming your opinions for this case?

A. I didn't specifically go pull the references. But I would tell you there are literally hundreds of books on risk management that are what I call generic risk

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1 management, they're not specific to any given topic or  
2 domain. You could take any one of those textbooks on risk  
3 management and arrive at the same basic analysis that's in  
4 Exhibit 1.

5 Q. Going to this case specifically. If you received  
6 a daily log that lifeguards had kept that indicated the  
7 specific conditions of the day of the incident, and these  
8 were provided to you, would that have assisted you in your  
9 understanding of what a rough condition constituted?

10 A. That would be one of the things that would help  
11 in understanding what they're defining to be rough, yes.

12 Q. As you stated earlier, it's the water safety  
13 officers who determine when the conditions were rough  
14 enough to warrant closure of Zone 2?

15 MR. REINKE: Let me object. Assumes a fact not  
16 in evidence. Calls for speculation.

17 THE WITNESS: My understanding is that the water  
18 safety officers view the conditions and make a  
19 determination of the safety or lack thereof, and then they  
20 make the recommendation to the park manager and the park  
21 manager is the one that ultimately can make the decision  
22 to close.

23 BY MS. WATERS:

24 Q. From your review of the evidence in this case was  
25 there any mechanism or procedure for the park manager or

00227

1 ranger to announce the closure of the Zone 2 area on the  
2 date of the incident?

3 A. Not to my knowledge.

4 Q. Do you recall WSO Bregman testifying or stating  
5 that 80 to 90 percent of all rescues occurred in the slot  
6 or cable channel?

7 A. I don't recall the specific number, but I know it  
8 was a vast majority, yes, ma'am.

9 Q. And also does the evidence that you reviewed  
10 establish to you that Eric Powell and Jim Laughlin entered  
11 Zone 2 through the cable channel?

12 A. That's my understanding.

13 Q. By swimming through the cable channel?

14 A. Right. They came from the beach side through the  
15 channel to get into the area.

16 MS. WATERS: Thank you. I have nothing else.

17 MR. REINKE: I have a few questions for you, Dr.

18 Gill.

19 EXAMINATION

20 BY MR. REINKE:

21 Q. Are you planning to come to trial to testify in  
22 April?

23 A. Yes, I am.

24 Q. You're not planning to be out of the country or  
25 some other location besides Hawaii?

00228

1 A. No. Unfortunately my associate is covering that  
2 for me, so I plan on being here.

3 Q. You have an associate now?

4 A. I've had for several years.

5 Q. Who is that?

6 A. Joellen, J-o-e-l-l-e-n, last name Gill.

7 Q. Relation of yours?

8 A. Sister.

9 Q. She hasn't assisted you with this particular  
10 case, has she?

11 A. She has not.

12 Q. You indicated the slot was part of Zone 2. Where  
13 did you gather that information?

14 A. I believe it was from Bregman's deposition.

15 MR. REINKE: I have no further questions. Thank  
16 you.

17 MS. WATERS: Thank you.

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(The deposition was concluded at 5:35 p.m.)

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1 I, RICHARD T. GILL, Ph.D., do hereby certify that  
2 I have read the foregoing typewritten pages 1 through 228,  
3 inclusive, and corrections, if any, were noted by me and  
4 the same is now a true and correct transcript of my  
5 testimony.

6 Dated:

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10 RICHARD T. GILL, Ph.D.  
11 Signed before me this  
12 day of 2007.

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1 STATE OF HAWAII )  
2 ) SS.  
3 CITY AND COUNTY OF HONOLULU )

4 I, SHEILA BRITT LIPTON, CSR NO. 257, Notary Public  
5 in and for the State of Hawaii, do hereby certify:

6 That on March 2, 2007, 9:10 a.m. appeared before me  
7 RICHARD T. GILL, Ph.D., the witness whose deposition is  
8 contained herein; that prior to being examined, the  
9 deponent was by me duly sworn; that the deposition was  
10 taken in machine shorthand by me and was thereafter  
11 reduced to typewriting under my supervision; that the  
12 foregoing represents, to the best of my ability, a correct  
13 transcript of the deposition had at that time;

14 That the deponent was notified through counsel, by  
15 mail or by telephone to appear and sign; that if the  
16 deposition is filed without signature, either the reading  
17 and signing of the deposition were waived by stipulation  
18 of all parties or the deponent has failed to appear, and  
19 the deposition is therefore filed pursuant to Rule 30(e),  
20 Hawaii Rules of Civil Procedure.

21 Date:

22  
23  
24  
25  
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SHEILA BRITT LIPTON, CSR NO. 257  
Notary Public, State of Hawaii  
My Commission Expires: 5-9-2009